INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

LaGrand Case

(GERMANY *v.* UNITED STATES OF AMERICA)

VOLUME III

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

Affaire LaGrand

(ALLEMAGNE c. ÉTATS-UNIS D'AMÉRIQUE)

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(GERMANY *v.* UNITED STATES OF AMERICA)

AFFAIRE LAGRAND
(ALLEMAGNE c. ÉTATS-UNIS D'AMÉRIQUE)

1004

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This case, entered on the Court's General List on 2 March 1999 under number 104, was the subject of a Judgment delivered on 27 June 2001 (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 466).

The documents relating to the case are being published in the following order:

Volume I. Application instituting proceedings; request for the indication of provisional measures; Memorial of Germany.
Volume II. Memorial of Germany *(continuation)*; Counter-Memorial of the United States of America.
Volume III. Counter-Memorial of the United States of America *(continuation)*; Verbatim Records of the Hearings.

*

For the purposes of this edition, the Court has decided that the written pleadings will be reproduced *in full*; it will therefore also include the documents annexed to those pleadings, which are not made available on the Court's website. The reproduction of all the annexed documents in this edition will enable practitioners to appreciate better the full scope of the arguments developed by the Parties in their written pleadings. As usual, the verbatim records of the public hearings appear after the pleadings; these verbatim records are published here in their final corrected versions, providing a useful supplement to the provisional versions made available on the Court's website.

Since the Court wishes to publish these documents as quickly as possible, it has been decided, where technically feasible, to reproduce the pleadings in the form in which they were submitted by the Parties.

Some documents in this edition have thus been scanned, and there are consequently two types of page numbering for the items included in these volumes: in addition to the normal continuous pagination, the original page numbers of the scanned documents are provided in brackets for reference purposes.

The Hague, 2012.

La présente affaire, inscrite au rôle général de la Cour sous le numéro 104 le 2 mars 1999, a fait l'objet d'un arrêt rendu le 27 juin 2001 (*LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001*, p. 466).

Les documents relatifs à cette affaire sont publiés dans l'ordre suivant :

Volume I. Requête introductive d'instance ; demande en indication de mesures conservatoires ; mémoire de l'Allemagne.

Volume II. Mémoire de l'Allemagne *(suite)*; contre-mémoire des Etats-Unis d'Amérique.

Volume III. Contre-mémoire des Etats-Unis d'Amérique *(suite)*; comptes rendus d'audience.

*

Aux fins de la présente édition, la Cour a décidé que les pièces de la procédure écrite seront reproduites *intégralement*; cette édition comprendra donc aussi les documents annexés auxdites pièces — qui ne sont pas mis en ligne sur le site Internet de la Cour. La reproduction de l'ensemble des documents annexés dans cette édition permettra aux praticiens de mieux apprécier, dans toute sa portée, l'argumentation développée par les Parties dans leurs écritures. Comme à l'accoutumée, les comptes rendus des audiences publiques sont publiés à la suite des pièces de procédure écrite ; ces comptes rendus apparaissent ci-après dans leur version finale corrigée — qui complète ainsi utilement la version provisoire mise en ligne sur le site de la Cour.

La Cour souhaitant que lesdits documents paraissent aussi rapidement que possible, il a été décidé, chaque fois que les moyens techniques le permettraient, de reproduire les pièces de procédure en l'état où elles ont été présentées par les Parties.

Ainsi, certaines pièces de la présente édition ont été scannées et, de ce fait, les titres courants du présent ouvrage comportent deux genres de folios : outre la pagination continue habituelle, on trouvera, entre crochets, la pagination d'origine des pièces scannées, à laquelle il faudra se reporter en cas de renvoi.

La Haye, 2012.

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COUNTER-MEMORIAL
OF THE UNITED STATES OF AMERICA

CONTRE-MÉMOIRE
DES ÉTATS-UNIS D'AMÉRIQUE

LAGRAND CASE
(GERMANY V. UNITED STATES OF AMERICA)

DOCUMENTARY EXHIBITS TO THE

COUNTER-MEMORIAL

SUBMITTED BY

THE UNITED STATES OF AMERICA

27 MARCH 2000

Exhibit 1

"WALTER AND KARL LAGRAND: REPORT OF INVESTIGATION INTO CONSULAR NOTIFICATION ISSUES"
UNITED STATES DEPARTMENT OF STATE,
17 FEBRUARY 2000

United States Department of State

Washington, D.C. 20520

WALTER AND KARL LAGRAND

REPORT OF INVESTIGATION INTO CONSULAR NOTIFICATION ISSUES

The following information reflects the results of an investigation undertaken by the United States Department of State into the consular notification issues in the case of Walter and Karl LaGrand. The Department conducted the investigation in 1999 and 2000 with the assistance of the Attorney General's Office of the State of Arizona. The investigation included a review of numerous court, prison, and other documents obtained by the Arizona Attorney General's Office from its own files, court records, the Arizona Department of Corrections, the Arizona Department of Public Safety, and other sources. It also included a review of U.S. Department of Defense and Immigration and Naturalization Service (INS) records pertaining to the LaGrands. Regretfully, some documents that could have shed additional light on the issues could not be found or were no longer available.

The available information shows that Walter and Karl LaGrand were German nationals who should have been informed that the German Consulate General in Los Angeles could be notified of their arrest and detention. While the persons responsible for the LaGrands' arrest and detention initially understood the LaGrands to be U.S. citizens, documentary evidence shows that such persons had information by December 1984, and quite likely by mid-1983, that the LaGrands were German citizens. Accordingly, the obligation to inform them of the possibility of consular notification in connection with their 1982 arrest arose and was violated at some time between mid-1983 and the end of 1984, if not earlier.

FACTUAL BACKGROUND

The Criminal Process: Walter and Karl LaGrand were arrested on January 7, 1982, in Tucson, Arizona (about sixty miles north of the U.S.-Mexico border). They were charged with a number of crimes committed earlier that day in the course of an attempted armed robbery of the Valley National Bank in Marana, Arizona, a town northwest of Tucson. These crimes included the murder of the bank's 63-year-old manager, Ken Hartsock, and the attempted murder of a 20-year-old bank clerk, Dawn Lopez, who was seriously injured but who survived to testify against the LaGrands at trial. At the time of the crime, Walter was almost twenty years old. (He turned twenty less than three weeks later, on January 26, 1992.) Karl had turned eighteen three months before the crime (on October 10, 1981).

The LaGrands were tried by a jury starting January 31, 1984; were convicted of first degree murder and other offenses on February 17, 1984; and were sentenced by a judge on December 14, 1984. Arizona law gave the sentencing judge two options in sentencing the LaGrands for the murder of Ken Hartsock: a sentence of death or a sentence of life imprisonment with a possibility of parole after 25 years. There was no possibility of a sentence of life imprisonment without parole. The judge entered a sentence of death after finding the presence of aggravating circumstances and insufficient mitigating circumstances to warrant leniency.

The LaGrands were detained from the time of their arrest on January 7, 1982, until they were executed. Karl was executed on February 24, 1999, and Walter on March 3, 1999. Between 1984 and 1999, their convictions and sentences were reviewed and upheld by state and federal courts.

Personal Background: The LaGrands were born out of wedlock in Germany to a German mother whose name was then Emma Gebel - Walter on January 26, 1962, and Karl on October 10, 1963. Their mother led them to understand that Walter's natural father was an American serviceman from Puerto Rico stationed in Germany and that Karl's natural father was an Afro-American serviceman stationed in Germany. A third American serviceman stationed in Germany, Masie LaGrand, later married Emma Gebel and adopted the two half-brothers and their half-sister, also born out of wedlock. In 1967, Masie LaGrand brought his wife and the three children to the United States as lawful permanent resident aliens. The LaGrand children entered the United States on February 22, 1967, on a single German passport issued to Emma Gebel LaGrand, in which they were included.

When the LaGrands arrived in the United States, Walter was five and Karl three years, four months old. For all practical purposes, Walter and Karl spent the rest of their lives in the United States. They returned to Germany only to live briefly in Benjamin Franklin Village, a U.S. military housing complex for the U.S. Army base in Mannheim, Germany, from January 21, 1974, until late June or early July, 1974 - *i.e.*, when Walter was twelve and Karl ten and-a-half years old. It appears that this brief trip was made using U.S. military travel orders rather than a passport, and that the LaGrands may have traveled directly from a U.S. military base in the United States to the U.S. base in Mannheim and back. (Emma LaGrand's German passport expired in 1971, and the LaGrand brothers were not separately documented as German citizens until 1993. The LaGrands' U.S. INS files show only the 1967 INS inspection.)

Walter and Karl LaGrand's adoptive father, Masie LaGrand, apparently thought that his adopted sons and daughter had automatically acquired U.S. citizenship. In military papers completed in October 1970, Masie LaGrand identified his wife and three children as dependents born in Germany, but identified the three children as U.S. citizens while identifying his wife as a non-U.S. citizen.

In fact, however, Walter and Karl LaGrand never actually became U.S. citizens. They could have been naturalized as U.S. citizens if Masie LaGrand had completed the necessary applications on their behalf. His failure to do so may be attributable to his mistaken belief that his adopted children had automatically acquired U.S. citizenship.

Although they never became U.S. citizens, Walter and Karl LaGrand were fully Americanized by the time they were arrested fifteen years after immigrating to the United States. They looked like and had the mannerisms of Americans. Both at times wore their hair in an Afro-American style. They spoke English without any hint that they were not Americans. Neither is known to have spoken German. Walter had been married in the United States, and both apparently saw their future life as a life in the United States, not in Germany. Both apparently identified themselves at times as U.S. citizens, and they may have been ignorant of or ignored their German citizenship until 1992.

THE CONSULAR NOTIFICATION ISSUE

Germany and the United States are parties to the Vienna Convention on Consular Relations (Vienna Convention), which in Article 36 establishes obligations for notifying consular officials when foreign nationals are arrested or detained. Under Article 36, a German national arrested in the United States must be informed "without delay" by "the competent authorities" of the United States that he has a right to have a German consular post notified of his arrest and detention. If the German national so requests, the consular post must be notified. The United States considers that this obligation applies to all foreign nationals in the United States, but that it does not apply to persons who are both United States citizens and citizens of a foreign country (dual nationals).

In the United States, the "competent authorities" for consular notification purposes are the law enforcement officers who actually make an arrest or who subsequently assume responsibility for a foreign national's detention. The Department of State encourages arresting and detaining authorities to incorporate consular notification into the booking process, which occurs shortly after arrest and when a person arrested is taken to a detention facility. The Department has also encouraged officials of long-term detention facilities to confirm again that consular notification has been provided as required when a foreign national is convicted and transferred to such a facility.

The United States has not considered prosecutors or judicial authorities to be "competent authorities" responsible for notification, because such officials do not arrest foreign nationals or hold them in detention. Nevertheless, to promote compliance with consular notification requirements, since January 1998 the Department of State has encouraged prosecutors and judicial authorities to inquire whether consular notification procedures have been followed, and has begun to include such authorities in its consular notification and access training efforts.

Neither LaGrand brother was notified, as required by Article 36 of the Vienna Convention, of the right to request consular assistance prior to his learning, independently (in mid-1992), of this possibility. This makes it necessary to inquire whether "competent authorities" knew that the LaGrands were not U.S. citizens and when the responsibility for consular notification arose.

SUMMARY OF RESULTS OF THE INVESTIGATION

The investigation first examined what the those officials who act as "competent authorities" in the United States – the arresting and detaining officials – knew about the LaGrands' nationality and what actions they took in response. It also examined whether other persons involved in the case were aware of the LaGrands' nationality, and what actions they took. It then examined the extent to which German consular officers were able to communicate with the LaGrands after consular notification finally occurred in 1992. It also examined the possibility that the LaGrands might not have been sentenced to death had they been informed in 1982, as required, that they could have German consular officials notified of their arrests and detentions.

The officers who arrested Walter and Karl LaGrand and conducted the initial investigation of the crime generally assumed that the LaGrands were U.S. citizens. None knew or suspected that they were German. The only suggestion that the LaGrands might not be Americans arose from the fact that Dawn Lopez – the attempted murder victim – described Walter LaGrand to the police immediately after the crime as a "Mexican male."

The first detention record found suggesting that the LaGrands were not U.S. citizens is dated June 1983. By late December 1984, some detaining authorities had firm information that the LaGrands were German, not American. It therefore is clear that by late 1984, if not by mid-1983, "competent authorities" had sufficient information about the LaGrands' nationality to trigger the obligations of Article 36 of the Vienna Convention. Thus, Walter and Karl LaGrand should have been advised of their right to have German consular officials notified of their detention some time between mid-1983 and late 1984.

It is also clear that other persons not regarded as "competent authorities" by the United States acquired accurate information about the LaGrands' nationality. In 1984, a probation officer prepared presentence reports for the court that identified the LaGrands as German nationals. In addition to the court, the presentence report was given to both the prosecutor and defense counsel. The prosecutor and one defense lawyer did not take note of the information that the LaGrands were German, and continued to regard them as U.S. citizens. The other defense lawyer did not attach any significance to the fact that his client was German. In any event, none of the officials who saw the presentence report recognized the implications of the LaGrands' nationality for consular notification purposes.

The widely held assumption that the LaGrands were Americans was based on the LaGrands' appearance, demeanor, speech, and background, including the fact that the LaGrands' father was a U.S. serviceman who had been stationed in Germany. Many people knew that Walter and Karl LaGrand were born in Germany, but this fact was not taken in their community or by officials with whom they came into contact as an indication that they were not American. Those who encountered the LaGrands generally assumed they were Americans because their adoptive father was a U.S. serviceman, as did their adoptive father himself.

The assumption that the LaGrands were Americans was consistent with the demography and cultural assumptions of the United States, which is a nation of immigrants. Roughly 10% of the U.S. population has been foreign born since 1960. Many U.S. citizens have been born in Germany to American servicemen and other U.S. Government employees stationed in Europe. (The Department of State's computerized records, which go back to 1974, show an average of 14,256 documented births of U.S. citizens in Germany each year over the ten years 1974 through 1983.) In addition, because of prohibitions on discrimination in the United States Constitution and civil rights statutes, criminal justice officials in many jurisdictions have not inquired into the citizenship of detainees because such inquiries could give rise to accusations of unfair treatment based on national origin.

DETAILED RESULTS OF THE INVESTIGATION

The Arrest and Initial Investigation: The arrests and initial investigation were conducted jointly by agents of the U.S. Federal Bureau of Investigation (FBI), the Arizona Department of Public Safety (DPS), and the Pima County Sheriff's Department (PCSD). Each agency had responsibility for investigating different aspects of the crime. Each arresting entity filed reports of the arrest and initial investigation. None of the reports indicates that either brother was German.

There are three FBI reports. The FBI report of its arrest of Walter LaGrand describes him by race as "Half-Black" and notes that he has a "curly afro cut." It provides a social security number and information indicating that Walter had been employed and educated in Arizona and that his mother, brother, and sister were in Arizona. It notes that Walter was born in Germany, but does not address his nationality and does not identify his mother as a German national. The corresponding FBI report with respect to Karl LaGrand provides somewhat less identifying information. It notes that Karl was born in Germany, but does not address his nationality. The third FBI report, of a January 7 interview with Walter LaGrand's girlfriend, recounts that the girlfriend said that Walter's mother was a German national. There is no indication, however, that either the girlfriend or the FBI agents recognized that Walter was German.

Paul ("Cub") Nixon of DPS prepared a detailed incident report on January 7, 1982. The report includes biographical data about Walter and Karl LaGrand that the LaGrands provided, but does not state that they were German citizens. At no time did the LaGrands advise Nixon that they were German citizens. He assumed that they were Americans because they had social security numbers (included in the report) and because he knew that their adoptive father was American. Nixon also prepared a supplemental report recounting investigatory actions taken between January 7 and January 11 that does not identify the LaGrands as German.

Detective Weaver Barkman of PCSD assisted with the initial investigation, primarily by talking with Karl LaGrand and obtaining his confession. The transcript of the confession shows that Karl's English gave no hint that he was not an American citizen. Detective Barkman's report, dated January 11, also does not identify the LaGrands as German. In the report

Detective Barkman states that, while he was talking with another agent, "I was informed that information developed during the investigation to that point indicated that Walter LaGrand (the Mexican) had done the stabbing in the bank." It is unclear whether Detective Barkman actually thought that Walter LaGrand was Mexican, or whether he was simply identifying Walter as the brother who looked Mexican. (Walter's natural father was Puerto Rican American, and Dawn Lopez had described Walter as Mexican.) Detective Barkman has advised that the question of the LaGrands' citizenship was never brought up and never seemed relevant at the time of the arrests or trial, but that he took it for granted that the LaGrands were U.S. citizens, in part because their father was a U.S. serviceman.

The Initial Detention: The LaGrands were initially detained in the Pima County Jail. Walter LaGrand was detained in the jail until May 3, 1982, and Karl LaGrand until May 6, 1982. At the jail, a form titled "Arrest Information" (sometimes referred to as a "booking sheet") and a release questionnaire were completed for each brother. The "Arrest Information" form includes a box to be checked if the arrested person is a U.S. citizen. On Walter's sheet, the box is checked to indicate that he is a U.S. citizen. The related release questionnaire similarly identifies Walter as a U.S. citizen. On Karl's arrest sheet, the citizenship box is blank. Karl's release questionnaire is also incomplete. Arizona has advised that the "Arrest Information" forms and the release questionnaires are completed on the basis of information received from the person arrested, and that Karl declined to provide the requested information. There is no indication that the Pima County Jail authorities ever knew that the LaGrands were German nationals.

The Pre-Trial Detention by the Arizona Department of Corrections: Walter and Karl LaGrand were transferred to the custody of the Arizona Department of Corrections on May 3 and May 6, 1982, respectively. A Department of Corrections document about Walter, dated February 16, 1982, and titled "Initial Classification," identifies Walter as a 20-year-old citizen of the United States. A document dated May 11, 1982, about Karl and signed by Karl notes his birthplace in Germany but does not speak to his citizenship; while an "Initial Classification" document shows Karl as an 18-year-old U.S. citizen.

About a year later, on June 30, 1983, a records supervisor for the Arizona State Prison system wrote to the U.S. Immigration and Naturalization Service (INS) advising (wrongly) that Walter and Karl LaGrand may have "entered the United States illegally." This official would have had no direct contact with the LaGrands and no direct responsibility for their detention. Nevertheless, the document strongly suggests that by mid-1983 at least some Arizona officials in the Arizona state prison system believed that the LaGrands were not U.S. citizens.

The Trial: (January 31-February 17, 1984): The prosecutor was Michael D. Alfred, who is now a judge in Arizona. He has advised that he knew that the LaGrands were born in Germany and that their mother was German, but that he also knew that their fathers were U.S. servicemen and assumed throughout the trial that the LaGrands were U.S. citizens. At most, he would have thought they were dual nationals; he would not have thought that they were not also U.S. citizens. The citizenship information in the presentence reports made no impression on him.

Walter's defense lawyer was Bruce A. Burke. He has advised that he was aware that Walter was a German citizen, but he did not attempt to bring the fact of Walter's arrest and detention to the attention of German consular officials. He was unaware of the provisions of the Vienna Convention.

Karl's defense lawyer was David M. Gerson. He has advised that he knew that the LaGrands were born in Germany, but that this information did not indicate to him that they were German. Mr. Gerson grew up as a U.S. military dependent and had known many U.S. citizens born outside the United States. He particularly assumed that the LaGrands were U.S. citizens because their fathers were U.S. servicemen. Mr. Gerson has advised that, had he noticed the information in the presentence report that Karl was not a U.S. citizen, he would have assumed that the information was wrong.

The Sentencing Proceeding: The LaGrands' sentencing hearing was held on December 14, 1984. Perry Montgomery, a probation officer, prepared a presentence report about each brother. These reports are dated April 2, 1984. (The hearing apparently was originally scheduled for April 13, 1984, and then rescheduled.) An entry in a small box in the top right corner of first page of each report identifies each brother as a citizen of Germany and a resident alien of the United States – *i.e.*, not a U.S citizen. Thus, it is clear that the probation officer was aware of Walter and Karl's German citizenship. Earlier documents attached to the report (generated in connection with Walter and Karl's prior contacts with the judicial system) indicate that this citizenship information was available to probation services as early as December 1980, in connection with the LaGrands' earlier contacts with the justice system.

As noted, probation officers have not been regarded by the United States as "competent authorities" for consular notification purposes because they are not responsible for the arrest or detention of persons. Probation officers are court employees, not law enforcement officers. They provide judges with information relevant to how persons in the criminal justice system should be treated both before and after trial. The presentence report is given to the court for the judge's use, and copies are made available to the prosecutor and defense counsel. Arizona has advised the Department that the report is not routinely given to the detaining officials. Thus, the officers normally expected to assume the responsibility of "competent authorities" under Article 36 would not necessarily have received copies of the presentence reports and would not necessarily have learned that the LaGrands were German from those reports. (As noted above, however, detaining authorities clearly had received information that the LaGrands were German nationals between mid-1983 and the end of 1984.)

It is nevertheless regrettable that no one who saw the presentence report undertook to ensure that the LaGrands received consular notification. It appears that the citizenship information in the report was either overlooked, not considered relevant, or considered to be in error by the prosecutor and the two defense counsel. In any event, neither these persons nor the judge apparently knew or undertook to advise the LaGrands that they could request consular assistance based on their nationality.

Post-sentencing detention: After their sentencing on December 14, 1984, the LaGrands were permanently in the custody of the Arizona Department of Corrections. A Department of Corrections "Inmate Identification Form" dated December 28, 1984, pertaining to Karl LaGrand clearly shows him to be a German citizen with a U.S. Immigration and Naturalization Service (INS) alien identification number. A similar document of the same date with respect to Walter also shows an INS number and German citizenship. The LaGrands' immigration files suggest that the 1983 letter from the Arizona prison records clerk mentioned above triggered an INS investigation that resulted in the INS commencing deportation proceedings against the LaGrands based on their criminal activities. As a result, in January 1985, INS sent the Arizona State Prison notices stating that immigration detainers had been placed on both brothers. The prison acknowledged the INS notices on January 24, 1985. In January 1985 INS also sent Walter and Karl LaGrand papers (Orders to Show Cause) advising them that they were subject to deportation as criminal aliens.

Because officials of the Department of Corrections are competent authorities for purposes of providing consular notification, it is clear that the obligations of Article 36 had attached by the time the Inmate Identification Forms were dated (December 28, 1984). Moreover, the 1983 inquiry of the Department of Corrections to INS suggests that the Department may have known of the LaGrands' citizenship, and the consular notification obligation may have come into operation, by some earlier date, perhaps around the time the 1983 letter was written. (INS would not have been responsible for consular notification in this case, because it was not detaining the LaGrands and was not in a position to advise them that they could request German consular assistance. INS is, however, responsible for consular notification with respect to aliens that it detains directly.)

The Department of Corrections took no steps to inform the LaGrands that they could request consular notification prior to 1992, when the LaGrands learned about consular notification from other sources.

THE PERIOD AFTER GERMAN CONSULAR OFFICIALS BECAME INVOLVED

In June 1992, Walter and Karl LaGrand established contact with German consular officials in Los Angeles. They also wrote to INS requesting copies of the 1985 papers, which they had "misplaced." It appears that the German consular officials did not immediately accept that the LaGrands were in fact German. On October 15, 1992, INS sent the LaGrands duplicate copies of the 1985 Orders to Show Cause requested in the LaGrands' letters of June 1992. A German consular official nevertheless considered it necessary to ask INS directly, by letter of November 19, 1992, whether the LaGrands ever obtained U.S. citizenship. (Under the treaty establishing friendly relations of August 25, 1921, Germany agreed that a German citizen who became a citizen of the United States would no longer be regarded as a German.) On December 10, 1992, INS sent the German consular officer a letter confirming that the LaGrands had never become U.S. citizens. Only thereafter, on March 15, 1993, did Germany issue Certificates of German Citizenship to Walter and Karl LaGrand, who had never held their own German passports.

German consular officials visited Karl LaGrand in prison on at least eight occasions between 1992 and 1999: on December 8, 1992; March 29, June 30, and October 10, 1994; February 10, 1995; September 27, 1996; September 8, 1998; and again on one or two dates in February 1999.

German consular officials visited Walter LaGrand somewhat less often because he occasionally refused consular visits. It appears that consular visits occurred on December 8, 1992; March 29, June 30, and October 10, 1994; and February 10, 1995; that Walter refused visits on or about May 12, 1995, and September 8, 1998; and that he was again visited in February 1999.

German consular officials also established contact with defense counsel for Walter and Karl LaGrand in 1992 or 1993. It presumably was defense counsel who provided the presentence reports to German officials (portions of the reports have been submitted in the German Memorial to the International Court of Justice). It is unclear when German consular officials received copies of the presentence reports; the reports would have been available to the consular officials after they established contact with the LaGrands' defense counsel in 1992 - 1993.

German consular officials did not raise the possibility of a failure of consular notification in LaGrands' cases with the U.S. Department of State, which accordingly did not initiate a formal investigation to ascertain the facts relevant to the failure to follow consular notification obligations (until this investigation was undertaken). The first official communications from the Government of Germany to the Government of the United States about the LaGrands' cases apparently were letters of January 27, 1999, from Foreign Minister Fischer to Secretary of State Albright; of February 2, 1999, from Chancellor Schroeder to President Clinton; and of February 5, 1999, from President Herzog to President Clinton. These letters focused on the fact that the LaGrands were subject to the death penalty and expressed Germany's opposition to this form of punishment. They did not mention any concern about consular notification. President Herzog's letter stated that he did not "doubt the legitimacy of the conviction nor the fairness of the procedure before the courts of the State of Arizona and the federal courts." Only on February 22, 1999, two days before the scheduled execution of Karl LaGrand, did Foreign Minister Fischer write to Secretary Albright raising the possibility of a failure of consular notification.

The extent of direct communications between German consular officials and officials of the State of Arizona about the failure of consular notification is unclear. It appears that between 1992 and 1999 some Arizona officials continued to think that the LaGrands were Americans, and therefore dual nationals. It also appears that, during this period, Arizona may have advised German officials, apparently correctly, that none of the arresting officers knew that the LaGrands were German nationals at the time of their arrest. German officials appear to have understood Arizona officials to say also that no one in any official position knew that the LaGrands were German nationals at any time prior to their sentencing. It appears that there may have been misunderstandings about both the relevant facts and about what was being said.

At the February 23, 1999, parole hearing for Karl LaGrand, persons appealing for clemency contended, among other things, that a German consular official could have made available to defense counsel information about Karl's difficult childhood in Germany. In response to this and other points, Kenneth Peasley, the attorney representing Arizona, called the parole board's attention to the fact that the presentence reports clearly identified the LaGrand brothers as German and included extensive information about their troubled childhoods. Thus, he argued, mitigation evidence of the kind Germany argued it could have made available was available to the LaGrands' defense counsel and the sentencing judge.

While the presentence reports referred to by Mr. Peasley had been available to German consular officials since 1992, German officials at the 1999 parole hearing nevertheless were surprised by his accurate description of them, and apparently inferred that there had been some misrepresentation by Arizona officials about when the LaGrands' nationality became known. (In fact, the LaGrands' immigration and nationality status was so imperfectly understood by themselves, their family, and others involved in the LaGrands' cases that only in the course of the instant investigation has it been possible to discern, also imperfectly, when the LaGrands' nationality became known to competent authorities for purposes of Article 36.)

THE POSSIBILITY OF PREJUDICE

There is no evidence that Walter or Karl LaGrand was treated less favorably by the criminal justice system than a U.S. citizen would have been. Indeed, both brothers were treated as if they were Americans because for all intents and purposes that is what they appeared to be. Because they were regarded as Americans, they could not have been discriminated against on the basis of their German nationality.

There is no basis, either, for saying that the LaGrands were handicapped in their defense by any inability to speak English, unfamiliarity with the American judicial system, geographic separation from family or friends in Germany, or other factors that could be relevant when a foreign national is being tried by the judicial system of an unfamiliar country.

Both LaGrands were represented by defense counsel whose performance has been scrutinized by U.S. courts at several levels and who have been determined by appropriate judicial authorities to have provided the constitutionally required level of representation.

Significant mitigation evidence was available about the LaGrands, including evidence regarding their early childhoods in Germany, notwithstanding the absence of consular assistance. The sentencing judge, defense counsel, and the psychiatric witnesses called on behalf of Walter and Karl LaGrand during the sentencing hearing all had access to significant information about the troubled circumstances of the LaGrands' childhoods. The presentence reports prepared by probation officer Perry Montgomery were detailed and comprehensive, and were made available to defense counsel as well as to the sentencing judge. The reports concluded that, in mitigation, the judge could consider the fact that the LaGrands' actions "may have partially resulted from a poor home environment, lack of family stability, broken home, poverty, and/or a lack of education." In support of this statement, the reports offered significant information about the LaGrands' troubled childhoods, including the periods of their childhood spent in Germany. For example, the presentence report for Walter LaGrand attaches a more detailed earlier report dated December 4, 1980, which contains the following information:

> "The defendant [Walter LaGrand] was second of three illegitimate children born of different fathers while his mother lived in Augsburg, Germany. He reports that his father was Puerto Rican and had left without marrying his mother before the defendant was born. He reports that his mother placed the children in a convent when they were very young, as she was unable to take care of them because she was required to work to support the family. She eventually married a Black American soldier, who adopted her three children, at which time the defendant's mother retrieved the children from the convent to live with her and her husband."

(This attachment is in the court's file; we do not know if it was with the report as provided to German consular officials.) The psychiatrist who testified on Karl LaGrand's behalf in the sentencing phase also noted that Karl's life in Germany had been especially difficult.

Thus the sentencing judge had information about the LaGrands' first five and three-and-a-half years of life in Germany, including evidence that the LaGrands had been placed in a convent temporarily. Additional evidence about those brief years in Germany would have been cumulative and still would have related to a brief and early period in the LaGrands' lives. Defense counsel and the judge also had available extensive information of similar character about the brothers' troubled family lives during the much longer period that they lived in the United States and in Benjamin Franklin Village, a U.S. military housing complex associated with the U.S. Army base in Mannheim. None of the evidence about the LaGrands' early years in Germany was as significant as the evidence of the boys' experiences over the fifteen years from the time they left Germany at ages three and-one-half and five until they committed the Hartsock murder at ages 18 and near-20.

Arizona has provided information about judicial precedents in Arizona relating to the use of mitigation evidence. Under Arizona law, a difficult childhood or family history can be mitigating, but there must be a causal connection between the upbringing and the murder. Arizona has provided examples of thirty-four cases in which such mitigation evidence was offered but was not shown to have been linked to the criminal behavior. There is no indication that the LaGrands' experiences in Germany in those early years bore any special causal connection to the murder, or were more relevant to the murder than the subsequent fifteen years after they left Germany.

Under Arizona law, information about the LaGrands' troubled childhoods had to be and was balanced by the court against evidence that the crime was "aggravated" and that the brothers would continue to be a danger to society. This evidence included the graphic and deeply disturbing testimony of Dawn Lopez, who witnessed Ken Hartsock's murder and was herself stabbed repeatedly during the robbery. It also included evidence of prior violent behavior by both LaGrand brothers.

Given the balance of the evidence, Arizona officials have advised that imposition of the death penalty was not surprising. Arizona has provided examples of a number of similar cases in which the defendant was also sentenced to death. Detective Weaver Barkman, who investigated the murder and took Karl LaGrand's confession, has advised that imposition of the death penalty in this case seemed appropriate to him at the time. He has reviewed the affidavit by Jeannette Laura Sheldon, an employee of the Federal Public Defender's Service, in which she states that Detective Barkman advised her that "this case has always disturbed me because I never considered this crime to warrant the death penalty." Detective Barkman has indicated that Ms. Sheldon misunderstood statements he made concerning the fact that he has come to oppose the death penalty in recent years. In 1982-1984, however, he considered the death penalty appropriate for the LaGrands. He has noted that, in a different case that arose around the same time as the Hartsock murder, he believed strongly that the death penalty should not be imposed. In that case, he called the prosecutor to urge that the death penalty not be sought. He did not make a similar appeal to the prosecutor against seeking the death penalty with respect to the LaGrands.

CONCLUSION

The LaGrands were thoroughly Americanized German citizens whose appearance, language, and mannerisms provided no clue to their German nationality. At the time of their arrest in January 1982, Walter apparently identified himself as a U.S. citizen, whereas Karl did not answer the question. Subsequent 1982 prison documentation shows both Walter and Karl as U.S. citizens. Only in mid-1983 is there evidence that at least some detaining authorities had come to know or suspect that the LaGrands were not U.S. citizens. It is clear that such detaining authorities knew the LaGrands were German citizens and not U.S. citizens by shortly after their sentencing in December 1984, if not by mid-1983. Such authorities should have ensured that the LaGrands were advised of the right to have German consular officials notified of their arrest and detention.

Whether the LaGrands would have asked to have German consular officials notified, given how thoroughly Americanized they were, must remain a matter of speculation. There is no indication, however, that they identified themselves as German or would have looked to the German Government for assistance in 1982. If a German consular officer had been notified, he presumably would have first wanted to confirm the LaGrands' citizenship, as did German consular officials who learned of the LaGrands in 1992. Whether a German consular officer in 1982-1984 would have provided significant consular assistance, including obtaining evidence from Germany, is also a matter of speculation. The Department has no information about German consular practices at that time, and the frequency of consular visits and other actions taken from 1992 to 1999 may or may not be indicative of what would have happened ten years earlier. In any event, information about Walter LaGrand from the time he was born until age five, and about Karl LaGrand from his birth until age three and-a-half, presumably would not have been gathered by Germany unless at the request of the LaGrands' defense counsel. Information about the LaGrands' troubled childhood, including some information about their lives in Germany, was available to defense counsel and the sentencing judge in 1984, without consular assistance. There is no particular reason to think that the LaGrands' defense counsel would have relied on German consular officers to obtain additional information in 1984. In any event, it is highly doubtful that any additional information about those brief periods of the brothers' lives in Germany would have changed the outcome.

U.S. Department of State
February 17, 2000

Exhibit 2

NOTE OF 18 FEBRUARY 2000, FROM THE DEPARTMENT OF STATE TO THE EMBASSY OF THE FEDERAL REPUBLIC OF GERMANY

The Department of State refers the Embassy of the Federal Republic of Germany to the case of Walter and Karl LaGrand, two German nationals executed in 1999 by the State of Arizona for a murder committed on January 7, 1982, during the course of an attempted bank robbery. The Department also refers to the consular notification obligations established by Article 36 of the Vienna Convention on Consular Relations, and to the concerns expressed by the Government of Germany regarding the fact that neither Walter nor Karl LaGrand was informed, as required by Article 36, that a German consular post could be notified of his arrest, if he wished.

The Department of State recognizes the importance of the obligations arising under Article 36 to the performance of consular functions, and is seriously concerned whenever a foreign government calls to its attention a possible failure by competent authorities of the United States to adhere to these obligations. Accordingly, the Department has invited all Embassies to bring to its attention cases of alleged failures of compliance with these obligations or with similar obligations established by relevant bilateral agreements. The Department has assured all Embassies that it will investigate such alleged treaty

violations and, if a failure of compliance is confirmed, work with the responsible competent authorities to prevent a recurrence. The Department has also informed all Embassies of its efforts to improve understanding of and compliance with consular notification and access obligations throughout the United States. These issues were discussed with the diplomatic community (including a representative of the Embassy) at Blair House on July 28, 1998, and in the Department's circular diplomatic note of January 29, 1998.

Consistent with these assurances, the Department of State has completed a thorough investigation into the case of Walter and Karl LaGrand. With the passage of time, some potentially relevant documents or files could no longer be found, but the Department was able to obtain and carefully review numerous other documents received from the State of Arizona, the U.S. Department of Defense, and the U.S. Immigration and Naturalization Service (INS). The Department also reviewed reports of interviews conducted at the Department's request with knowledgeable persons. The results of the investigation are described in the attached report. The Department would be pleased to answer any questions about the report that the Embassy might have.

Through its investigation the Department of State has ascertained that many persons involved in the LaGrands' arrest, detention, and prosecution considered the LaGrands to be United States citizens. Nevertheless, Arizona authorities responsible for the

LaGrands' detention (competent authorities for purposes of the consular notification obligations set forth in Article 36 of the Vienna Convention) knew by late December 1984, and perhaps by June 1983, that Walter and Karl LaGrand were German citizens and not also citizens of the United States. These authorities did not recognize the implications of the LaGrands' nationality for purposes of advising the brothers that they could request that German consular officials be notified of their arrest.

The Department deeply regrets that neither Walter nor Karl LaGrand was told that he could request consular assistance. The brothers appear to have learned of the possibility of seeking such assistance in 1992, eight years after they had been convicted and sentenced. On behalf of the United States, the Department of State extends sincere apologies to the Government of Germany for the failure of United States authorities to observe the obligations of Article 36 of the Vienna Convention on Consular Relations in the case of Walter and Karl LaGrand.

The Department wishes to assure the Government of Germany that the United States recognizes that compliance with consular notification requirements must be improved and is engaged in a comprehensive efforts to this end. The Department of State is working with federal, state, and local government officials to ensure that consular notification requirements are fully understood and to guard against future violations of these requirements. As described in the

Department's circular note of January 29, 1998, this effort has included the January 1998 publication of a booklet titled *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them*. This seventy-two-page booklet is designed to be maintained at a central location, such as a jail or other detention facility. The Department has also developed a small reference card designed to be carried by individual arresting officers. As of January 2000, the Department has distributed approximately 26,000 booklets and over 300,000 cards to arresting officers, prosecutors and judicial authorities in every state of the United States, and in other jurisdictions such as the District of Columbia. The Department also has made the booklet available through the internet and federal depository libraries. The booklet is now widely available to, and used by, criminal defense lawyers, detainees, and members of the public as well as by federal, state, and local officials.

Consular notification and access obligations have also been reviewed at numerous training seminars and meetings throughout the United States. Many of these events have been held in states with significant populations of foreign nationals. Department of State officials have traveled for this purpose to Arizona, California, Florida, Illinois, Massachusetts, New Jersey, New Mexico, New York, North Carolina,

Texas, Virginia, and Washington. Department officials have also spoken about consular notification and access issues at a number of regional or national events, such as special conferences of the states that border Mexico, seminars on international prisoner transfer, international and regional police chiefs meetings, and meetings of federal and state prosecutors.

The Department of State has worked particularly closely with the State of Arizona, which has taken a number of specific steps to ensure that consular notification is provided as required. On June 24, 1998, the Attorney General of Arizona sent all Arizona county attorneys a memorandum reminding them of the requirements of the Vienna Convention and providing excerpts from and information about the Department of State's booklet. The Arizona Attorney General has also written to the Chief Justice of the Arizona Supreme Court suggesting a change in the rules of the courts of Arizona, to help ensure compliance. The Phoenix, Arizona, Police Department has adopted an order on consular notification. The Arizona Department of Corrections has compiled and distributed within the Department of Corrections a list of consular offices in the United States in or nearest to Arizona. It has also adopted procedures that require that the citizenship of detainees be determined and that a notice about consular assistance be provided by prison reception centers "to all foreign born inmates received by the Department." Pursuant to these procedures, Karl and Walter LaGrand were given formal notification of their right to contact their consular officials on December 21, 1998. While the Department recognizes that this notice was too late to constitute compliance with Article 36 in the LaGrands' cases, it nevertheless shows how the procedures now in place in Arizona are being followed.

These and other specific instructions issued by Arizona authorities have been supplemented by wide distribution within Arizona of the Department of State's booklet, and by numerous training sessions. Department of State officials have spoken about consular notification requirements at a statewide meeting in Flagstaff, and at meetings in Nogales, Phoenix, and Yuma, Arizona. The Arizona Attorney General's Office has undertaken similar efforts, and is continuing to work on these and other initiatives to improve understanding of and compliance with consular notification and access obligations throughout the state.

Similar educational efforts in other states of the United States are also on-going. In coming months, the Department will be conducting programs on consular notification in California, Hawaii, Nevada, Pennsylvania, and Utah.

The Department notes that the United States has consistently expected arresting and detaining authorities to assume the functions of "competent authorities" under Article 36 of the Vienna Convention. In its current efforts, however, the Department is encouraging prosecutors and judicial officials to inquire, as they come into contact with foreign nationals, whether consular notification procedures have been completed and, if not, to ask that notification be made as required. In addition, the Department is planning a special effort to reach members of the federal and state judiciary before whom criminal defendants are generally brought within the first twenty-four to seventy-two hours after arrest. The Department notes that this effort will be of particular relevance in the context of cases like those of Walter and Karl LaGrand, where information about the LaGrands' German nationality was available to judicial authorities through the presentence reports prepared by the LaGrands' probation officer (a court employee) before it became available to the authorities responsible for the LaGrands' detention.

So that the full scope of consular notification obligations will be understood and complied with, the Department is also working to educate coroners and other officials responsible for reporting deaths (Vienna Convention Article 37(a)) and judges involved in the appointment of guardianships (Article 37(b)). It has also taken steps to ensure the provision of consular notification in cases of shipwrecks and air crashes (Article 37(c)).

Through efforts such as these, the Department of State hopes that consular notification requirements will be incorporated into the routine training programs of law enforcement and judicial officials throughout the United States. These requirements are also

becoming widely known to criminal defense attorneys, who themselves seek consular assistance for their clients with increasing frequency.

The Department regrets that it did not have an opportunity to provide the Embassy with this information prior to the executions of Walter and Karl LaGrand. When Foreign Minister Fischer first raised the possibility of a failure of consular notification with Secretary of State Albright, on February 22, 1999, two days before the scheduled execution of Karl LaGrand, there was insufficient time for an investigation. The Department therefore renews its previous invitations to bring promptly to the Department's attention any cases in which the Embassy believes that a failure of consular notification may have occurred. The Department is committed to investigating such allegations when they are raised, and to taking all appropriate steps to ensure that violations of consular notification requirements are not repeated.

Enclosure:

Report.

Department of State,

Washington, February 18, 2000

Exhibit 3

DECLARATION OF M. ELIZABETH SWOPE, UNITED STATES DEPARTMENT OF STATE, 14 MARCH 2000

DECLARATION OF
M. ELIZABETH SWOPE, UNITED STATES DEPARTMENT OF STATE

1. I am M. Elizabeth Swope. In 1998, Secretary of State Albright named me Senior Coordinator for Consular Notification to spearhead State Department efforts to improve U.S. compliance with consular notification and access requirements. I am a Senior Foreign Service Officer with extensive consular and management experience both in Washington and abroad.

2. In my capacity as Senior Coordinator, I work with federal, state and local government officials throughout the United States to increase awareness of consular notification and access obligations. I have established notification and access outreach programs, many in coordination with the State Department's Bureau of Diplomatic Security, Office of Protocol, and Office of Foreign Missions, to provide programs and training to law enforcement and criminal justice personnel. My office has also worked closely with the U.S. Department of Justice and with other Federal agencies to ensure that their staffs are fully aware of consular notification and access requirements.

3. Key parts of our efforts are our booklet, *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them* and pocket cards with information about consular notification

requirements, which we distribute to law enforcement officials, criminal justice personnel, and judges. To date, we have distributed more than 44,000 booklets and more than 300,000 cards. In addition, we have established direct links to officials in the individual U.S. States responsible for coordinating consular notification and access within their states.

4. The United States' outreach efforts regarding consular notification are accurately described in the Department of State's diplomatic note to Germany of February 18, 2000 (Exhibit 2), except that the number cited in the note for booklets distributed may have been too low. The figure of 44,000 above reflects significant mailings of booklets not included when the Department's note was sent.

5. A more detailed list of the major outreach activities of this office is attached. This list accurately describes activities with which I am familiar.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 1st, 2000
(date)

M Elizabeth Swope
M. Elizabeth Swope

Attachment: *Consular Notification and Access Initiatives*

CONSULAR NOTIFICATION AND ACCESS INITIATIVES

Distribution of Materials

As of March 15, 2000 we have distributed more than 44,000 copies of the booklet, ***Consular Notification and Access***, to

- Governors and Attorneys General of all U.S. States;
- United States Attorneys;
- INTERPOL State liaison officers;
- Immigration and Naturalization Service;
- Chiefs of diplomatic missions in the United States;
- 475 foreign consular officials in the United States; and
- Federal, state and local law enforcement officials

The booklet is also available on the Department's web site:
http://www.state.gov/www/about_state/ca_prelim.html.

The Department is producing a training video for law enforcement and criminal justice personnel designed to educate viewers on general consular functions, especially protection and welfare, and on consular notification and access. This video will include appearances by US and foreign consular officers. It should be in production by June 2000.

Establishment of Direct Link with State Officials

Secretary Albright wrote to Governors of U.S. states, requesting them to name state coordinators for consular notification and access and enclosing a copy of our booklet.

State Department Legal Adviser David R. Andrews wrote to 50 U.S. states' Attorneys General.

Training Seminars

Beginning in late 1997, the Department began to participate in an ongoing series of training seminars, including:

Texas Criminal Law Enforcement Conference, Austin, Texas;

Four US Border States Conference of Attorneys General, Albuquerque, New Mexico;

Seminar on International Prisoner Transfer Program, Department of Justice, Washington, DC;

Seminar for Los Angeles area Law Enforcement Officials and Foreign Consular Officials;

Diplomatic Immunity and Consular Notification and Access seminars in Boston, Seattle, New York, Chicago, San Francisco, Orlando, Miami and Essex County, New Jersey;

Chiefs of Diplomatic Missions Meeting with Metropolitan Chief of Police, Washington, DC;

Border Trade Alliance, Phoenix, Arizona;

Consular Corps College, Washington, DC;

Office of Foreign Missions Regional Directors' Conference, Washington, DC;

Seminars with Mexican Officials in Calexico/Mexicali, San Diego/Tijuana, Laredo/Nuevo Laredo, Brownsville/Matamoros, Nogales and Yuma/San Luis Rio Colorado;

Metropolitan Washington, DC Area Seminar for Law Enforcement and Criminal Justice Personnel at the Department of State's Foreign Service Institute;

Virginia Commonwealth Attorneys' Conference, Williamsburg, Virginia;

Metropolitan Washington Area Council of Governments Committee of Police Chiefs;

Regional Law Enforcement Mini-Seminar, Raleigh, North Carolina;

Mini-Seminar for Regional INS Personnel, Phoenix, Arizona;

US Attorney's "Pow Wow" (included State and Local Law Enforcement Officials), Flagstaff, Arizona;

International Association of Chiefs of Police Meeting, Charlotte, North Carolina;

Capitol Hill Police Training Academy, Washington, DC;

Mini-Seminar for San Mateo County California Prosecutors, San Mateo County, California;

Mini-Seminar for DEA Headquarters Personnel, Washington, DC; and

Florida Sheriffs' Association Conference, Destin, Florida.

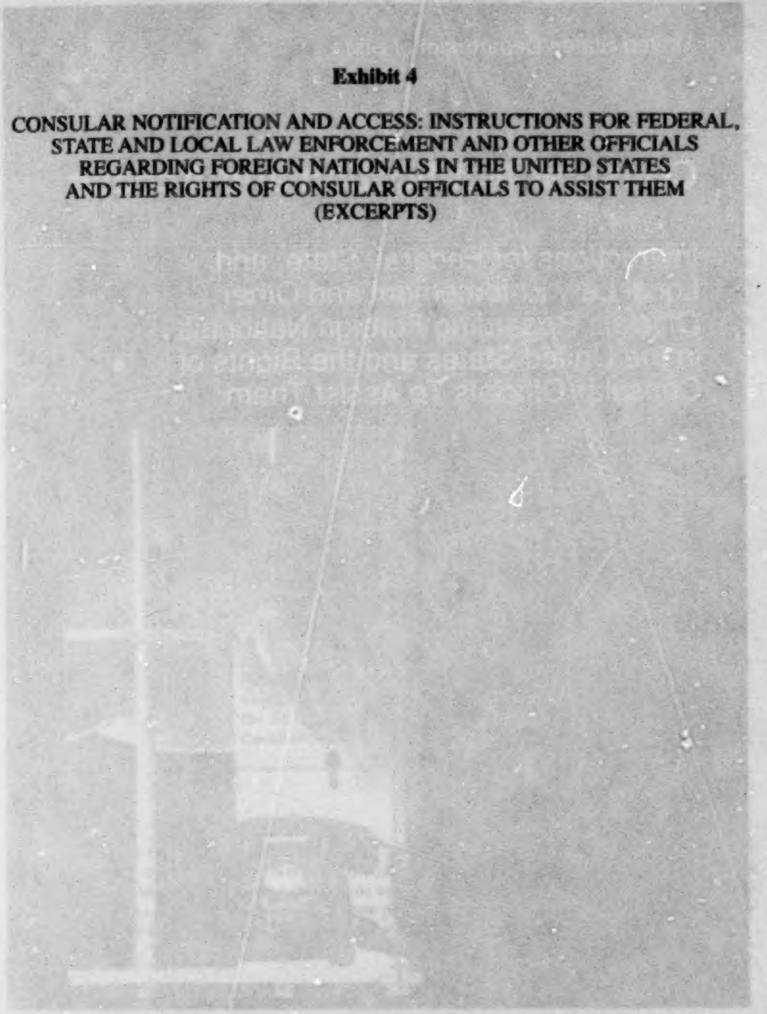
We anticipate participating in additional regional seminars in El Paso, Honolulu, Las Vegas, and Salt Lake City during the next few months.

We continue to meet with state coordinators, and criminal justice and law enforcement leaders about our program, as we already have in Washington, Illinois, Arizona, California, New Mexico, Texas, Florida, and New Jersey.

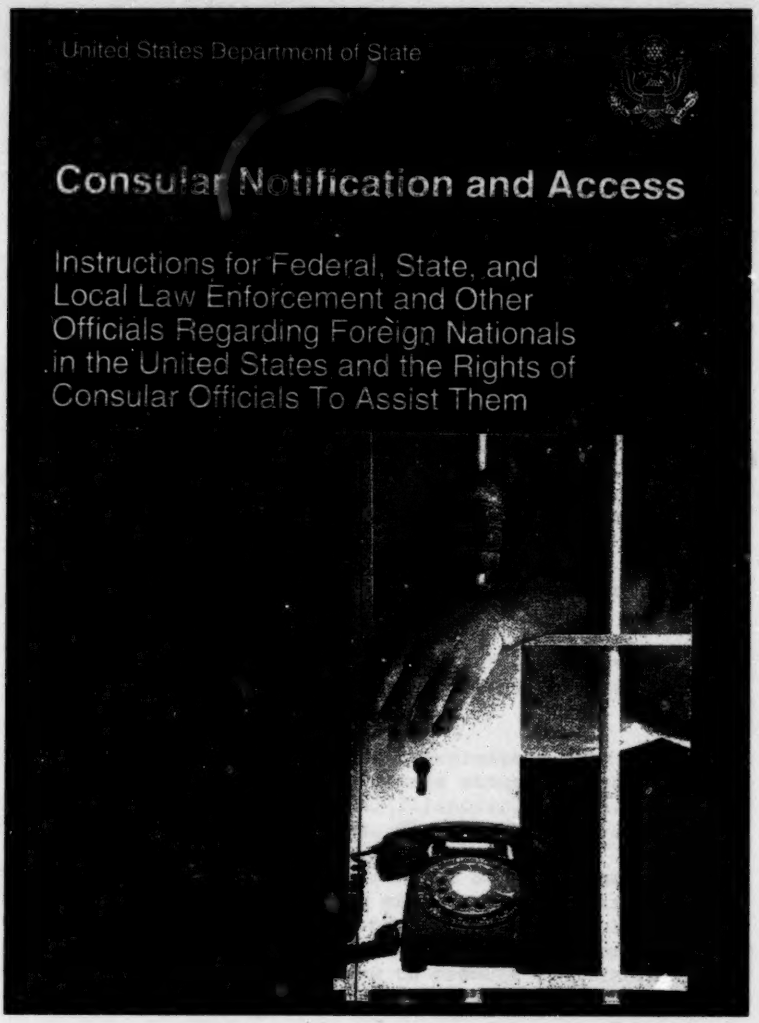
We anticipate that the Department of State's Legal Adviser shortly will write to federal magistrates and district court judges to reinforce US commitment to consular notification and access. We will be seeking support from these members of the judiciary to promote compliance with consular notification and access requirements.

Exhibit 4

CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM (EXCERPTS)



Instructions for Federal, State, and
Local Law Enforcement and Other
Officials Regarding Foreign Nationals
in the United States and the Rights of
Consular Officials To Assist Them



United States Department of State

Consular Notification and Access

Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them

About This Booklet

This booklet contains instructions and guidance relating to the arrest and detention of foreign nationals, deaths of foreign nationals, the appointment of guardians for minors or incompetent adults who are foreign nationals, and related issues pertaining to the provision of consular services to foreign nationals in the United States. This booklet is designed to help ensure that foreign governments can extend appropriate consular services to their nationals in the United States and that the United States complies with its legal obligations to such governments. The instructions and guidance herein should be followed by all federal, state, and local government officials, whether law enforcement, judicial, or other, insofar as they pertain to foreign nationals subject to such officials' authority or to matters within such officials' competence.

The continued cooperation of federal, state, and local law enforcement agencies in ensuring that foreign nationals in the United States are treated in accordance with these instructions will permit the United States to comply with its consular legal obligations domestically. It will also help ensure that the United States can insist upon rigorous compliance by foreign governments with respect to United States citizens abroad. The Department of State appreciates the assistance of all law enforcement officials in helping to achieve these objectives.

If you have questions not addressed in this booklet, write or call:

**Office of the
Assistant Legal Adviser for
Consular Affairs
L/CA, Room 5527A
U.S. Department of State
Washington, D.C. 20520
telephone 202-647-4415
fax 202-736-7559**

For urgent telephone inquiries after normal business hours, you may call the State Department Operations Center at 202-647-1512.

The full text of this publication is available at: http://www.state.gov. The Department of State expects to update it every 2-5 years. Note that the instructions in this booklet are in addition to those pertaining to the treatment of foreign diplomatic and consular officers. For information on the treatment of such officers, see the Department of State publication titled *"Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities."*

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Part One
Basic Instructions

The following pages summarize the basic requirements of consular notification and access in a format designed to be distributed or posted as readily accessible instructions or notices to all federal, state, or local officials who may, in the performance of their official functions, have contact with a foreign national in a situation triggering a requirement to notify the foreign national's consular officials. Also included are suggested notification statements to be given to a detained foreign national, a suggested fax notification to be transmitted to a detained foreign national's consular officials, and samples of identification cards that a consular official may present when seeking access to a detained foreign national.

These basic instructions and implementation tools, which may be freely photocopied and posted as notices, include:

- **Summary of Requirements Pertaining to Foreign Nationals**
- **Steps To Follow When a Foreign National Is Arrested or Detained**
- **Mandatory Notification Countries and Jurisdictions**
- **Suggested Statements to Arrested or Detained Foreign Nationals**
    1. **When Consular Notification is at the Foreign National's Option**
    2. **When Consular Notification is Mandatory**
- **Suggested Fax Sheet for Notifying Consular Officers of Arrests or Detentions**
- **Consular Identification Cards**

Summary of Requirements Pertaining to Foreign Nationals

1. **When foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified.**

2. **In some cases, the nearest consular officials *must* be notified of the arrest or detention of a foreign national, regardless of the national's wishes.**

3. **Consular officials are entitled to access to their nationals in detention, and are entitled to provide consular assistance.**

4. **When a government official becomes aware of the death of a foreign national, consular officials must be notified.**

5. **When a guardianship or trusteeship is being considered with respect to a foreign national who is a minor or incompetent, consular officials must be notified.**

6. **When a foreign ship or aircraft wrecks or crashes, consular officials must be notified.**

These are mutual obligations that also pertain to American citizens abroad. In general, you should treat a foreign national as you would want an American citizen to be treated in a similar situation in a foreign country. This means prompt, courteous notification to the foreign national of the possibility of consular assistance, and prompt, courteous notification to the foreign national's nearest consular officials so that they can provide whatever consular services they deem appropriate.

Steps To Follow When a Foreign National Is Arrested or Detained

---

1. Determine the foreign national's country. In the absence of other information, assume this is the country on whose passport or other travel document the foreign national travels.
2. If the foreign national's country is **not** on the mandatory notification list on the next page:
   - Offer, without delay, to notify the foreign national's consular officials of the arrest/detention. For a suggested statement to the foreign national, see page 7 (Statement 1). Translations of the statement into selected foreign languages are in Part Four of this booklet.
   - If the foreign national asks that consular notification be given, notify the nearest consular officials of the foreign national's country without delay. For phone and fax numbers for foreign embassies and consulates in the United States, see Part Six of this booklet. A suggested fax sheet for making the notification is on page 9.
3. If the foreign national's country is on the list of mandatory notification countries on the next page:
   - Notify that country's nearest consular officials, without delay, of the arrest/detention. Phone and fax numbers are in Part Six, and you may use the suggested fax sheet on page 9 for making the notification.
   - Tell the foreign national that you are making this notification. A suggested statement to the foreign national is found on page 7 (Statement 2), and translations into selected languages are in Part Four.
4. Keep a written record of the provision of notification and actions taken.

Mandatory Notification Countries and Jurisdictions

Antigua and Barbuda
Armenia
Azerbaijan
Bahamas, The
Barbados
Belarus
Belize
Brunei
Bulgaria
China[1]
Costa Rica
Cyprus
Czech Republic
Dominica
Fiji
Gambia, The
Georgia
Ghana
Grenada
Guyana
Hong Kong[2]
Hungary
Jamaica
Kazakhstan
Kiribati
Kuwait
Kyrgyzstan
Malaysia
Malta
Mauritius
Moldova
Mongolia
Nigeria
Philippines
Poland (non-permanent residents only)
Romania
Russia
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the Grenadines
Seychelles
Sierra Leone
Singapore
Slovakia
Tajikistan
Tanzania
Tonga
Trinidad and Tobago
Turkmenistan
Tuvalu
Ukraine
United Kingdom[3]
U.S.S.R.[4]
Uzbekistan
Zambia
Zimbabwe

---

[1] Notification is not mandatory in the case of persons who carry "Republic of China" passports issued by Taiwan. Such persons should be informed without delay that the nearest office of the Taipei Economic and Cultural Representative Office ("TECRO"), the unofficial entity representing Taiwan's interests in the United States, can be notified at their request.

[2] Hong Kong reverted to Chinese sovereignty on July 1, 1997, and is now officially referred to as the Hong Kong Special Administrative Region, or "SAR." Under paragraph 3(f)(2) of the March 25, 1997, U.S.-China Agreement on the Maintenance of the U.S. Consulate General in the Hong Kong Special Administrative Region, U.S. officials are required to notify Chinese officials of the arrest or detention of the bearers of Hong Kong passports in the same manner as is required for bearers of Chinese passports — *i.e.*, immediately, and in any event within four days of the arrest or detention.

[3] British dependencies also covered by this agreement are Anguilla, British Virgin Islands, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

[4] Although the U.S.S.R. no longer exists, some nationals of its successor states may still be traveling on its passports. Mandatory notification should be given to consular officers for all nationals of such states, including those traveling on old U.S.S.R. passports. The successor states are listed separately above.

Suggested Statements to Arrested or Detained Foreign Nationals

Statement 1:
When Consular Notification Is at the Foreign National's Option
(For Translations, See Part Four)

As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel, and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular officials?

Statement 2:
When Consular Notification is Mandatory
(For Translations, See Part Four)

Because of your nationality, we are required to notify your country's consular representatives here in the United States that you have been arrested or detained. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. We will be notifying your country's consular officials as soon as possible.

Suggested Fax Sheet for Notifying Consular Officers of Arrests or Detentions

---

Date: ________

Time: ________

To: Embassy of ______________________________, Washington, D.C.

or

Consulate of ____________, ____________, ____________

(Country) (City) (State)

From: Name: ______________________________

Office: ______________________________

Street Address: ______________________________

City: ______________________________

State: ______________________________

ZIP Code: ______________________________

Telephone: (___)______________________________

Fax: (___)______________________________

Subject: NOTIFICATION OF ARREST/DETENTION OF A NATIONAL OF YOUR COUNTRY

We arrested/detained the following foreign national, whom we understand to be a national of your country, on ____________, ____________.

Mr./Ms. ______________________________

Date of birth: ______________________________

Place of birth: ______________________________

Passport number: ______________________________

Date of passport issuance: ______________________________

Place of passport issuance: ______________________________

To arrange for consular access, please call ____________________ ________ between the hours of ________ and ________. Please refer to case number ______________ when you call.

Comments:

Part Two

Detailed Instructions on the Treatment of Foreign Nationals

The instructions in this booklet should be followed by all federal, state, and local government officials, whether law enforcement, judicial, or other, insofar as they pertain to foreign nationals subject to such officials' authority or to matters within their competence. These instructions relate to the arrest and detention of foreign nationals, deaths of foreign nationals, the appointment of guardians for minors or incompetent adults who are foreign nationals, and related issues pertaining to the provision of consular services to foreign nationals in the United States. They are intended to ensure that foreign governments can extend appropriate consular services to their nationals in the United States and that the United States complies with its legal obligations to such governments.

The instructions in this booklet are based on international legal obligations designed to ensure that governments can assist their nationals who travel abroad. While these obligations are in part matters of "customary international law," most of them are set forth in the Vienna Convention on Consular Relations ("VCCR"), and some are contained in bilateral agreements, conventions, or treaties (*i.e.*, agreements between the United States and just one other country). The agreements discussed herein have the status of treaties for purposes of international law and Article VI, clause 2 of the Constitution of the United States ("all treaties made . . . shall be the supreme law of the land"). They are binding on federal, state, and local government officials to the extent that they pertain to matters within such officials' competence.

These instructions focus primarily on providing consular notification and access with respect to foreign nationals arrested or detained in the United States, so that their governments can assist them. The obligations of consular notification and access apply to United States citizens in foreign countries just as they apply to foreign nationals in the United States. When U.S. citizens are arrested or detained abroad, the United States Department of State seeks to ensure that they are treated in a manner consistent with these instructions, and that U.S. consular officers can similarly assist them. It is therefore particularly important that federal, state, and local government officials in the United States comply with these obligations with respect to foreign nationals here.

These instructions also discuss obligations relating to deaths of foreign nationals, to the appointment of guardians for foreign nationals who may be minors or incompetent adults, and to foreign aircraft or ship wrecks. Like the obligations of consular notification and access, these are mutual obligations that also apply abroad.

The Department of State appreciates the continued cooperation of federal, state, and local law enforcement agencies in helping to ensure that foreign nationals in the United States are treated in accordance with these instructions. Such treatment will permit the United States to comply with its consular legal obligations domestically and to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad.

Arrests and Detentions of Foreign Nationals

Whenever a foreign national is arrested or detained in the United States, there are legal requirements to ensure that the foreign national's government can offer him/her appropriate consular assistance. *In all cases, the foreign national must be told of the right of consular notification and access. In most cases,* the foreign national then has the option to decide whether to have consular representatives notified of the arrest or detention. *In other cases,* however, the foreign national's consular officials must be notified of an arrest and/or detention regardless of the foreign national's wishes. *Whenever a foreign national is taken into custody, the detaining official should determine whether consular notification is at the option of the foreign national or whether it is mandatory.* A list of all embassies and consulates in the United States, with their telephone and facsimile numbers, is included in this booklet to facilitate the provision of notification by detaining officials to consular officials when required.

Notification at the Foreign National's Option

In all cases, the foreign national must be told of the right of consular notification and access. The foreign national then has the option to decide whether he/she wants consular representatives notified of the arrest or detention, *unless* the foreign national is from a "mandatory notification" country. The mandatory notification countries are listed on page 5 and in Part Five of this booklet.

If the detained foreign national is a national of a country not on the mandatory notification list, the requirement is that the foreign national be informed without delay of the option to have his/her government's consular representatives notified of the detention. *If the detainee requests notification, a responsible detaining official must ensure that notification is given to the nearest consulate or embassy of the detainee's country without delay.*

Mandatory Notification

In some cases, "mandatory notification" must be made to the nearest consulate or embassy "without delay," "immediately," or within the time specified in a bilateral agreement between the United States and a foreign national's country, *regardless of whether the foreign national requests such notification.* Mandatory notification requirements arise from different bilateral agreements whose terms are not identical. The exact text of the relevant provisions on mandatory notification in our bilateral agreements is reproduced in Part Five of this booklet.

Foreign nationals subject to mandatory notification requirements should otherwise be treated like foreign nationals not subject to the mandatory notification requirement. Thus, for example, the foreign national should be informed that notification has been made and advised that he/she may also specifically request consular assistance from his or her consular officials.

Privacy concerns or the possibility that a foreign national may have a legitimate fear of persecution or other mistreatment by his/her government may exist in some mandatory notification cases. The notification requirement should still be honored, but it is possible to take precautions regarding the disclosure of information. For example, it may not be necessary to provide information about why a foreign national is in detention. Moreover, *under no circumstances should any information indicating that a foreign national may have applied for asylum in the United States or elsewhere be disclosed to that person's government.* The Department of State can provide more specific guidance in particular cases.

Recordkeeping

Law enforcement agencies should keep written records sufficient to show compliance with the above notification requirements. These records should show all notifications to foreign consular representatives. In addition, in cases in which notification is at the discretion of the detained foreign national, these records should show that the foreign national was informed of the option of consular notification, the date when the foreign national was so informed, and whether or not the foreign national requested that consular officials be notified. If a confirmation of receipt of notification is available, it should be saved if possible.

The Department of State from time to time receives inquiries and complaints from foreign governments concerning foreign nationals in detention. The Department in such cases may request information from the relevant law enforcement officials on whether consular notification was in fact given. Concerns about consular notification may also be raised by foreign consular officials directly with the responsible federal, state, and local officials. Good recordkeeping will facilitate responding to these inquiries and to any consular notification issues that may be raised in litigation.

Consular Access to Detained Foreign Nationals

Detained foreign nationals are entitled to communicate with their consular officers. Any communication by a foreign national to his/her consular representative must be forwarded by the appropriate local officials to the consular post without delay.

Foreign consular officers must be given access to their nationals and permitted to communicate with them. Such officers have the right to visit their nationals, to converse and correspond with them, and to arrange for their legal representation. They must refrain from acting on behalf of a foreign national, however, if the national opposes their involvement. In addition, consular officers may not act as attorneys for their nationals.

The rights of consular access and communication generally must be exercised subject to local laws and regulations. For example, consular officers may be required to visit during established visiting hours. Federal, state, and local rules of this nature may not, however, be so restrictive as to defeat the purpose of consular access and communication. Such rules "must enable full effect to be given to the purposes" for which the right of consular assistance has been established.

The above requirements are set out in Article 36 of the VCCR. Additional requirements may apply to particular countries because of bilateral agreements.

Deaths of Foreign Nationals

If federal, state, or local government officials become aware of the death of a foreign national in the United States, they must ensure that the nearest consulate of that national's country is notified of the death. This will permit the foreign government to make an official record of the death for its own legal purposes. For example, such notice will help ensure that passports and other legal documentation issued by that country are canceled and not reissued to fraudulent claimants. In addition, it may help ensure that the foreign national's family and legal heirs, if any, in the foreign country are aware of the death and that the death is known for estate purposes in the foreign national's country.

The above requirements are set out in Article 37 of the VCCR. Additional requirements may apply to particular countries because of bilateral agreements.

Appointments of Guardians or Trustees for Foreign Nationals

Whenever a probate court or other legally competent authority considers appointing a guardian or trustee with respect to a foreign national who is a minor or an adult lacking full capacity, the nearest consular authorities for that national's country must be informed without delay. The legal procedures for appointment of a guardian or trustee can proceed, but — if possible without prejudice to the appointment process — the consular authorities should be permitted to express any interest their government might have in the issue.

The above requirements are set out in Article 37 of the VCCR. Additional requirements may apply to particular countries because of bilateral agreements.

Accidents Involving Foreign Ships or Aircraft

If a ship or airplane registered in a foreign country wrecks or crashes in the United States, the nearest consular officials of that country must be notified without delay. This requirement is set out in Article 37 of the VCCR. Additional requirements may apply to particular countries because of bilateral agreements. Once notified, consular officials may undertake to coordinate contacts with the victims' families or other emergency actions required by the foreign government concerned.

Part Four

Translations of Suggested Statements To Be Made to Foreign Nationals To Be Arrested or Detained

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How To Use the Translations

There appear below, in thirteen different languages commonly used by foreign nationals in the United States, statements that can be shown to a foreign national who has been arrested or detained and who does not understand English. There are two statements for each foreign language, which are shown below in English and on the following pages in translation. Statement 1 is for use if consular notification is at the foreign national's discretion, and Statement 2 for use if consular notification is mandatory. These statements are the same as Statement 1 and Statement 2 on page 7 of this booklet, except that Statement 1 includes an additional sentence asking the foreign national to circle "yes" or "no" to indicate whether consular notification should be made. The words "yes" and "no" then appear in both the foreign language and in English, to help minimize the possibility of any misunderstanding between the federal, state, or local government officials and the foreign national. The additional language is shown in italics in Statement 1 as it appears in English below.

Statement 1:
When Consular Notification Is at the Foreign National's Option

As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel, and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular officials? *Please circle "yes" or "no."*

Yes (in foreign language)/Yes (in English) *No (in foreign language)/No (in English)*

Statement 2:
When Consular Notification Is Mandatory

Because of your nationality, we are required to notify your country's consular representatives here in the United States that you have been arrested or detained. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. We will be notifying your country's consular officials as soon as possible.

ARABIC

Statement 1:
When Consular Notification is at the Foreign National's Option

كمواطن لا يحمل الجنسية الامريكية مقبوض عليه او محتجز، من حقك ان تطلب منا اخطار ممثلى قنصلية دولتك هنا فى الولايات المتحدة، إذا كنت ترغب فى ذلك. قد يستطيع مسؤول قنصلى من دولتك، من بين اشياء اخرى، مساعدتك فى الحصول على محام، والإتصال بعائلتك، وزيارتك فى مكان احتجازك. إذا اردت منا اخطار المسؤولين القنصليين لدولتك، يمكن ان تطلب هذا الاخطار الان، او فى اى وقت فى المستقبل. بعد اخطار المسؤولين القنصليين لدولتك، قد يقوموا بالاتصال بك هاتفياً او بزيارتك. هل تريد منا اخطار المسؤولين القنصليين لدولتك؟.

لا   نعم
No   Yes

(رجاء وضع دائرة على نعم أو لا)

Statement 2:
When Consular Notification is Mandatory

أننا ملزمون، بسبب جنسيتك، باخطار الممثلين القنصليين لدولتك هنا فى الولايات المتحدة الامريكية بأنه قد تم القاء القبض عليك او احتجازك. بعد اخطار المسؤولين القنصليين لدولتك، قد يقوموا بالاتصال بك هاتفياً او بزيارتك. انت غير ملزم بقبول مساعدتهم، ولكنهم قد يستطيعوا، من بين اشياء اخرى، مساعدتك فى الحصول على محام، والإتصالك بعائلتك، وزيارتك فى مكان احتجازك. سنقوم باخطار الممثلين القنصليين لدولتك بأسرع ما يمكن.

CHINESE

Statement 1:
When Consular Notification is at the Foreign National's Option

你作为非美国公民被捕或受到拘留时，有权在自愿情况下要求我们通知你本国驻美国领事代表．你本国领事官员可能有能力帮助你得到法律辅助，通知你的家人以及到拘留所探访你等等．如果你希望我们通知你本国的领事，就可以现在或者以后任何时候提出此要求．你本国的领事得到通知后可以来电话或者来探访你．你希望我们通知你本国的领事吗?

希望 (YES)　　不希望 (NO)

Statement 2:
When Consular Notification is Mandatory

由于你的国籍，我们根据要求要向你本国驻美国的领事代表通知你被捕或者受到拘留的情况．你本国的领事官员接到通知后可以给你打电话或者来探访你．不要求你接受他们的协助，但是他们可以帮你取得法律辅助，通知你的家人，以及来拘留所探访你等等．我们将尽快地通知你国的领事官员．

FARSI

Statement 1:
When Consular Notification is at the Foreign National's Option

چه زمانی دادن اطلاع به کنسولگری به صلاح تبعه خارجی است
شما بعنوان یک فرد غیر آمریکائی بازداشت شده حق دارید در صورتیکه مایل باشید به نمایندگان کنسولی خود در آمریکا مراتب را اطلاع دهید. یک نماینده رسمی کنسولی کشور شما ممکن است بتواند برای گرفتن وکیل کمک کند و علاوه بر چیزهای دیگر با افراد خانواده شما بمنظور ملاقاتشان در محل بازداشت تماس بگیرد. اگر بخواهید به نمایندگان کنسولی کشورتان اطلاعی دهید میتوانید هم اکنون چنین درخواستی را تسلیم کنید یا آنرا به آینده موکول سازید. نمایندگان کنسولی کشور شما پس از اطلاع از جریان امر ممکن است بخواهند بشما تلفن کنند یا با شما تماس بگیرند، آیا مایلید ما به نمایندگان کنسولی کشورتان در این زمینه اطلاع دهیم؟ بلی – YES

خیر – NO

خواهشمند است پاسخ خود را با دایره مشخص کنید.

Statement 2:
When Consular Notification is Mandatory

ما بمناسبت تابعیت شما مکلف هستیم به نمایندگان کنسولی کشورتان در آمریکا اطلاع دهیم شما در بازداشت بسر میبرید. نمایندگان کنسولی شما ممکن است پس از دریافت این اطلاعیه بخواهند به شما تلفن کنند یا به ملاقات شما بیایند. شما موظف نیستید کمک آنها را قبول کنید ولی آنان در عین حال ممکن است علاوه بر چیزهای دیگر برایتان وکیل بگیرند، با افراد خانواده شما ارتباط برقرار سازند و یا شما را در بازداشتگاه ملاقات کنند- ما در اولین فرصت ممکن مراتب را باطلاع نمایندگان کنسولی کشورتان خواهیم رساند.

FRENCH

Statement 1:
When Consular Notification is at the Foreign National's Option

Si vous êtes détenu ou en état d'arrestation, et ressortissant d'un autre pays que les Etats-Unis, vous avez le droit de nous demander, si vous le souhaitez, de prévenir le consulat de votre pays ici aux Etats-Unis. Un représentant consulaire de votre pays peut notamment être en mesure de vous aider à obtenir un avocat et peut contacter votre famille et vous rendre visite au cours de votre détention. Si vous souhaitez que nous prévenions le consulat, vous pouvez le demander maintenant ou à n'importe quel moment plus tard. Une fois prévenus, les officiers consulaires pourront vous appeler ou vous rendre visite. Désirez-vous que nous prévenions votre consulat?

YES NO
OUI NON
(Entourez la réponse correcte)

Statement 2:
When Consular Notification is Mandatory

Si vous êtes détenu ou en état d'arrestation, nous sommes tenus, en raison de votre nationalité, de prévenir le consulat de votre pays ici aux Etats-Unis. Une fois prévenus, les représentants consulaires pourront vous appeler ou vous rendre visite Vous n'êtes pas obligés d'accepter leur aide, mais ils peuvent notamment être en mesure de vous aider à obtenir un avocat, contacter votre famille et vous rendre visite au cours de votre détention. Nous préviendrons votre consulat le plus tôt possible.

GERMAN

Statement 1:
When Consular Notification is at the Foreign National's Option

Als fremder Staatsbürger, der in den Vereinigten Staaten verhaftet oder festgenommen wurde, haben Sie das Recht, zu verlangen, daß wir die konsularische Vertretung Ihres Landes hier in den USA benachrichtigen. Ein Konsulatsbeamter Ihres Landes kann Ihnen unter anderem bei der Auswahl eines Rechtsbeistands behilflich sein, sich mit Ihrer Familie in Verbindung setzen und Sie in der Haftanstalt besuchen. Wenn Sie wünschen, daß wir das Konsulat Ihres Landes benachrichtigen, können Sie uns dies jetzt oder zu einem beliebigen späteren Zeitpunkt wissen lassen. Nachdem Ihr Konsulat benachrichtigt worden ist, können die Konsulatsbeamten Sie anrufen oder besuchen. Wünschen Sie, daß wir Ihr Konsulat benachrichtigen?

YES (JA) NO (NEIN)

(BITTE MACHEN SIE EINEN KREIS UM JA ODER NEIN)

Statement 2:
When Consular Notification is Mandatory

Aufgrund Ihrer Staatsangehörigkeit sind wir verpflichtet, die konsularische Vertretung Ihres Landes in den Vereinigten Staaten davon zu benachrichtigen, daß Sie verhaftet oder festgenommen wurden. Nachdem Ihr Konsulat benachrichtigt worden ist, kann ein Konsulatsbeamter Sie anrufen oder besuchen. Sie sind nicht verpflichtet, seine Hilfe anzunehmen, aber er kann Ihnen unter anderem bei der Auswahl eines Rechtsbeistands behilflich sein, sich mit Ihrer Familie in Verbindung setzen und Sie in der Haftanstalt besuchen. Wir werden Ihr Konsulat so bald wie möglich benachrichtigen.

AFGHANISTAN

New York, NY (212) 972-1212; FAX (212) 972-1216 (U.N. Mission)

ALBANIA

Washington, D.C. (202) 223-4942; FAX (202) 628-7342

ALGERIA

Washington, D.C. (202) 265-2800; FAX (202) 213-5134

ANDORRA

New York, NY (212) 750-8064; FAX (212) 750-6638 (U.N. Mission)

ANGOLA

Washington, D.C. (202) 785-1156; FAX (202) 785-1258

ANTIGUA AND BARBUDA

Washington, D.C. (202) 362-5211; FAX (202) 362-5225

ARGENTINA

Atlanta, GA (404) 880-0805; FAX (404) 880-0806
Chicago, IL (312) 819-2660; FAX (312) 819-2626
Houston, TX (713) 871-8935; FAX (713) 871-0639
Los Angeles, CA (213) 954-9155; FAX (213) 937-3841 or (213) 934-9076
Miami, FL (305) 373-1889; (305) 371-7108
New York, NY (212) 603-0400; FAX (212) 541-7746
Washington, D.C. (202) 939-6400; FAX (202) 332-3171

ARMENIA

Washington, D.C. (202) 319-1976; FAX (202) 319-2982

AUSTRALIA

Chicago, IL (312) 645-9440; FAX (312) 645-1940
Honolulu, HI (808) 524-5050; FAX (808) 531-5142
Los Angeles, CA (310) 229-4800; FAX (310) 277-2258
New York, NY (212) 408-8400; FAX (212) 408-8401
San Francisco, CA (415) 362-6160; FAX (415) 986-2775
Washington, D.C. (202) 797-3000; FAX (202) 797-3168

AUSTRIA

Chicago, IL (312) 222-1515; FAX (312) 222-4113
Los Angeles, CA (310) 444-9310; FAX (310) 477-9897
New York, NY (212) 737-6400; FAX (212) 772-8926
Washington, D.C. (202) 895-6700; FAX (202) 895-6750

AZERBAIJAN

Washington, D.C. (202) 842-0001; FAX (202) 842-0004

BAHAMAS, THE

Miami, FL (305) 373-6295; FAX (305) 373-6312
New York, NY (212) 421-6420-22; FAX (212) 759-2135
Washington, D.C. (202) 319-2660; FAX (202) 319-2668

BAHRAIN

New York, NY (212) 223-6200; FAX (212) 319-0687
Washington, D.C. (202) 342-0741; FAX (202) 362-2192

BANGLADESH

New York, NY (212) 599-6767; FAX (212) 682-9211
Washington, D.C. (202) 342-8372 to 8376;
FAX (202) 333-4971

BARBADOS

Los Angeles, CA (213) 380-2198;
FAX (213) 384-2763
New York, NY (212) 867-8435; FAX (212) 986-1030
Washington, D.C. (202) 939-9200; FAX (202) [illegible]2-7467

BELARUS

New York, NY (212) 682-5392
Washington, D.C. (202) 986-2860/-1604;
FAX (202) 986-1805

BELGIUM

Atlanta, GA (404) 659-2150; FAX (404) 659-8474
Chicago, IL (312) 263-6624; FAX (312) 263-4805
Houston, TX (713) 224-8000; FAX (713) 224-1120
Los Angeles, CA (213) 857-1244; FAX (213) 936-2564
New York, NY (212) 586-5110; FAX (212) 582-9657
Washington, D.C. (202) 333-6900; FAX (202) 333-3079

BELIZE

Washington, D.C. (202) 332-9636; FAX (202) 332-6888

BENIN

Washington, D.C. (202) 232-6656; FAX (202) 265-1996

BHUTAN

New York, NY (212) 826-1919; FAX (826-2998

BOLIVIA

Aspen, CO (970) 923-2668; FAX (970) 923-6716
Atlanta, GA (404) 522-0777; FAX (404) 873-3355
Boston, MA (617) 742-1500; FAX (617) 742-9130
Chicago, IL (708) 343-1234; FAX (708) 343-4290
Cincinnati, OH (513) 271-5381; FAX (513) 271-8189
Houston, TX (218) 497-4068; FAX (218) 589-1458
Miami, FL (305) 358-3450; FAX (305) 374-8636

New Orleans, LA (504) 596-2720;
FAX (504) 596-2800
New York, NY (212) 687-0530; FAX (212) 687-0532
Phoenix, AZ (602) 231-9000; FAX (602) 275-8593
San Francisco, CA (415) 495-5173;
FAX (415) 399-8958
Seattle, WA (206) 244-6696; FAX (206) 243-3795
St. Louis, MO (314; 725-9466; FAX (314) 725-9103
Washington, D.C. (202) 232-4828; FAX (202) 328-3712

BOSNIA AND HERZEGOVINA
Washington, D.C. (202) 745-8000 Ext. 7457

BOTSWANA
Washington, D.C. (202) 244-4990; 4991;
FAX (202) 244-4164

BRAZIL
Atlanta, GA (404) 521-0061; FAX (404) 521-3449
Chicago, IL (312) 464-0245; FAX (312) 464-0299
Houston, TX (713) 961-3063; FAX (713) 961-3070
Los Angeles, CA (213) 651-2664;
FAX (213) 651-1274
Miami, FL (305) 285-6200; FAX (305) 285-6229
New York, NY (212) 757-3080; FAX (212) 956-3794
San Francisco, CA (415) 981-8170;
FAX (415) 981-3628
Washington, D.C. (202) 745-2700; FAX (202) 745-2827

BRUNEI
Washington, D.C. (202) 342-0159; FAX (202) 342-0158

BULGARIA
Washington, D.C. (202) 387-7969; FAX (202) 234-7973

BURKINA FASO
New York, NY (212) 288-7515
Washington, D.C. (202) 332-5577; FAX (202) 667-1882

BURMA (also known as Myanmar)
New York, NY (212) 734-1311; FAX (212) 737-2421
Washington, D.C. (202) 332-9044/45,
FAX (202) 332-9046

BURUNDI
Washington, D.C. (202) 342-2574; FAX (202) 342-2578

CAMBODIA
Washington, D.C. (202) 726-7742; FAX (202) 726-8381

CAMEROON
Washington, D.C. (202) 265-8790; FAX (202) 387-3826

CANADA
Atlanta, GA (404) 532-2000; FAX (404) 532-2050
Boston, MA (617) 262-3760; FAX (617) 262-3415
Buffalo, NY (716) 858-9500; FAX (716) 852-4340
Chicago, IL (312) 616-1860; FAX (312) 616-1877
Dallas, TX (214) 922-9806; FAX (214) 922-9815
Detroit, MI (313) 567-2340; FAX (313) 567-2164
Los Angeles, CA (213) 346-2700;
FAX (213) 346-2767
Miami, FL (305) 579-1600; FAX (305) 374-6774
Minneapolis, MN (612) 332-7486;
FAX (612) 332-4061
New York, NY (212) 596-1600; FAX (212) 596-1793
Seattle, WA (206) 443-1777;
FAX (206) 443-9662/443-9735
Washington, D.C. (202) 682-1740;FAX (202) 682-7726

CAPE VERDE
Boston, MA (617) 353-0014; FAX (617) 859-9798
Washington, D.C. (202) 965-6820; FAX (202) 965-1207

CENTRAL AFRICAN REPUBLIC
Washington, D. C. (202) 462-2517; FAX: same

CHAD
Washington, D.C. (202) 462-4009; FAX (202) 265-1937

CHILE
Chicago, IL (312) 654-8780; FAX (312) 654-8948
Houston, TX (713) 621-5853; FAX (713) 621-8672
Los Angeles, CA (310) 785-0113;
FAX (310) 785-0132
Miami, FL (305) 373-8623; FAX (305) 379-6613
New York, NY (212) 355-0612; FAX (212) 888-5288
Philadelphia, PA (215) 829-9520;
FAX (215) 829-0594
San Francisco, CA (415) 982-7662;
FAX (415) 982-2384
San Juan, PR (787) 725-6365; (787) 721-5650
Washington, D.C. (202) 785-1746; FAX (202) 887-557

CHINA
Chicago, IL (312) 346-0287-88; FAX (312) 580-2570
Houston, TX (713) 524-0780
Los Angeles, CA (213) 380-3105
New York, NY (212) 868-7752; FAX (212) 629-2698

San Francisco, CA (415) 563-4885
Washington, D.C. (202) 328-2500-02;FAX (202) 234-4055

COLOMBIA

Atlanta, GA (404) 237-1045; FAX (404) 237-7957
Boston, MA (617) 536-6222; FAX (617) 536-9372
Chicago, IL (312) 923-1196; FAX (312) 923-1197
Houston, TX (713) 527-8919; FAX (713) 529-3395
Los Angeles, CA (213) 282-1137; FAX (213) 383-2785
Miami, FL (305) 448-5558; FAX (305) 441-9537
New Orleans, LA (504) 525-5580; FAX (504) 525-4903
New York, NY (212) 949-9898; FAX (212) 972-1725
San Francisco, CA (415) 495-7195; FAX (415) 777-3731
San Juan, PR (809) 754-6885; FAX (809) 754-1675
Washington, D.C. (202) 332-7476; FAX (202) 332-7180

COMOROS

New York, NY (212) 972-8010

CONGO (Brazzaville)

Washington, D. C. (202) 726-0825; FAX (202) 726-1860

CONGO (Kinshasa) (formerly Zaire)

Washington, D.C. (202) 234-7690;
FAX (202) 686-3631

COSTA RICA

Atlanta, GA (770) 951-7025; FAX (770) 951-7072
Chicago, IL (312) 263-2772; FAX (312) 263-5807
Clearwater, FL (813) 726-1929; FAX (813) 726-1807
Houston, TX (713) 266-0484; FAX (713) 266-1527
Los Angeles, CA (213) 380-7915; FAX (213) 380-5639
Metairie, LA (504) 887-8131; FAX (504) 887-0916
Miami, FL (305) 871-7485/87; FAX (305) 871-0860
New York, NY (212) 425-2620/21;
FAX (212) 785-6818
San Diego, CA (619) 571-4875 (PHONE and FAX are same number)
San Francisco, CA (415) 392-8488;
FAX (415) 392-3745
San Juan, PR (809) 282-6747; FAX (809) 282-6744
Washington, D.C. (202) 328-6628; FAX (202) 597-3916

COTE D'IVOIRE (IVORY COAST)

Washington, D.C. (202) 797-0300; FAX (202) 483-8482

CROATIA

Washington, D.C. (202) 588-5899; FAX (202) 588-8936

CUBA

Washington, D.C. (202) 797-8518; FAX (202) 797-8521

CYPRUS

New York, NY (212) 686-6016
Washington, D.C. (202) 462-5772; FAX (202) 483-6710

CZECH REPUBLIC

Washington, D.C. (202) 274-9100/01;
FAX (202) 966-8540

DENMARK

Chicago, IL (312) 787-8780; FAX (312) 787-8744
Los Angeles, CA (310) 443-2090; FAX (310) 443-2099
New York, NY (212) 223-4545; FAX (212) 754-1904
Washington, D.C. (202) 234-4300; FAX (202) 328-1470

DJIBOUTI

Washington, D.C. (202) 331-0270; FAX (202) 331-0302

DOMINICA

New York, NY (212) 599-8478; FAX (212) 808-4975
Washington, D.C. (202) 364-6781; FAX (202) 364-6791

DOMINICAN REPUBLIC

Boston, MA (617) 482-8121; FAX (617) 482-9133
Chicago, IL (773) 772-6363
Detroit, MI (810) 545-7696
Houston, TX (713) 266-0165; (713) 780-1543
Jacksonville, FL (904) 880-8950; FAX (904) 880-2358
Los Angeles, CA (310) 858-7365
Mayaguez, PR (809) 833-4756; FAX (809) 832-4066
Miami, FL (305) 358-3220/21; FAX (305) 358-2318
Mobile, AL (334) 433-8894
New Orleans, LA (504) 522-1843; FAX (504) 522-1007
New York, NY (212) 768-2480; FAX (212) 768-2677
Philadelphia, PA (215) 923-3006; FAX (215) 923-3007
San Francisco, CA (415) 982-5144; FAX (415) 982-0237
San Juan, PR (787) 725-9550; FAX (787) 721-7820

Exhibit 5

CONSULAR NOTIFICATION AND ACCESS REFERENCE CARD: INSTRUCTIONS FOR ARRESTS AND DETENTIONS OF FOREIGN NATIONALS

Consular Notification and Access Reference Card: Instructions for Arrests and Detentions of Foreign Nationals

Consular Notification and Access Reference Card: Instructions for Arrests and Detentions of Foreign Nationals

This card summarizes for law enforcement officials the basic consular notification procedures to follow upon the arrest or detention of a foreign national. For more detailed instructions and legal material, see *Consular Notification and Access*, Department of State publication number 10518, released January 1998. The complete publication is available at http://www.state.gov/www/about_state/ca_prelim.html. Questions may also be addressed to:

Assistant Legal Adviser for
Consular Affairs
L/CA, Room 5527A
U.S. Department of State
Washington, D.C. 20520
telephone 202-647-4415
fax 202-736-7559

Urgent after-hours inquiries may be
directed to: 202-647-1512
(State Department Operations Center)

Mandatory Notification Countries

Antigua and Barbuda
Armenia
Azerbaijan
Bahamas, The
Barbados
Belarus
Belize
Brunei
Bulgaria
China
Costa Rica
Cyprus
Czech Republic
Dominica
Fiji
Gambia, The
Georgia
Ghana
Grenada
Guyana
Hong Kong
Hungary
Jamaica
Kazakhstan
Kiribati
Kuwait
Kyrgyzstan
Malaysia
Malta
Mauritius
Moldova
Mongolia
Nigeria
Philippines
Poland[2]
Romania
Russia
Saint Kitts and Nevis
Saint Lucia
Saint Vincent/Grenadines
Seychelles
Sierra Leone
Singapore
Slovakia
Tajikistan
Tanzania
Tonga
Trinidad and Tobago
Turkmenistan
Tuvalu
Ukraine
United Kingdom
U.S.S.R.[3]
Uzbekistan
Zambia
Zimbabwe

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[1] Does not include Republic of China (Taiwan) passport holders.

[2] Mandatory for nonpermanent residents only

[3] Passports may still be in use

Steps To Follow When a Foreign National Is Arrested or Detained[1]

1. Determine the foreign national's country. Normally, this is the country on whose passport or other travel document the foreign national travels.
2. If the foreign national's country is not on the mandatory notification countries list on the facing page:

   (I) Offer, without delay, to notify the foreign national's consular officials of the arrest/detention. (Statement 1, back of this card)

   (II) If the foreign national asks that consular notification be given, notify the nearest consular officials of the foreign national's country without delay.
3. If the foreign national's country is on the list of mandatory notification countries on the facing page:

   (I) Notify that country's nearest consular officials, without delay, of the arrest/detention.

   (II) Tell the foreign national that you are making this notification. (Statement 2, back of this card)
4. Keep a written record of the provision of notification and actions taken.

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[1] These steps should be followed for all foreign nationals, regardless of their immigration status.

Suggested Statements to Arrested or Detained Foreign Nationals

Statement 1: When Consular Notification Is at the Foreign National's Option

As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular officials?

Statement 2: When Consular Notification Is Mandatory

Because of your nationality, we are required to notify your country's consular representatives here in the United States that you have been arrested or detained. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. We will be notifying your country's consular officials as soon as possible.

(2/98)

Exhibit 6

WALTER LAGRAND'S PRESENTENCE REPORT DATED 20 OCTOBER 1980, A DOCUMENT APPENDED TO WALTER LAGRAND'S PRESENTENCE REPORT OF 2 APRIL 1984 (EXCERPT)

SOCIAL HISTORY: The defendant was the second of three illegitimate children born of different fathers while his mother lived in Augsburg, Germany. He reports that his father was Puerto Rican and had left without marrying his mother before the defendant was born. He reports that his mother placed the children in a convent when they were very young, as she was unable to take care of them because she was required to work to support the family. She eventually married a Black American soldier, who adopted her three children, at which time the defendant's mother retrieved the children from the convent to live with her and her husband. For the next several years, the defendant's family moved numerous times between the United States and Germany, due to his stepfather's military job requirements.

The defendant's family moved to Sierra Vista, Arizona, when he was approximately 11 years old. He reports that his mother and stepfather were having marital problems for several years and had been going out on each other, dating other people. When they moved to Sierra Vista, Arizona, the defendant's stepfather was sent to Viet Nam, and when he returned, he and the defendant's mother obtained a divorce. The defendant stated that this is when his problems began, as he really liked his stepfather and his mother would often abuse him by beating him for no reason and telling him that he would turn out to be no good, just like his father and stepfather. His mother continued to see numerous men, as she had even while married to his stepfather. The defendant would often voice his disapproval of his mother's actions, which seemed to cause additional problems between him and his mother. As a result, the defendant began running away, often turning himself in to authorities, in hopes of being sent to a foster home.

On September 23, 1974, he was placed at the Arizona Boys Ranch. He remained in that program until he heard that his mother did not want him to return home, and he reportedly attempted suicide (by attempting to jump off a bridge). As a result of that incident, the defendant was placed at Camelback Hospital from March 10, 1976, to May 5, 1976. The defendant denied attempting to commit suicide to this officer and stated that staff members at the Boys Ranch came to that inaccurate conclusion. On June 24, 1976, the defendant was placed at VisionQuest until he was committ to the Department of Corrections, Adobe Mountain School, on June 1 1977. He was committed to the Department of Corrections after being arrested for Grand Theft Auto, Aggravated Assault, and Unlawful Flight from a Law Enforcement Officer, resulting from one of his numerous attempts to run away from the juvenile program he was enrolled in at the time.

On September 23, 1977, the defendant was released from the Department of Corrections and placed back in the custody of the VisionQuest program in Bisbee, Arizona. In January of 1978, after turning 16 years old, the defendant was released from the VisionQuest program and sent home. The defendant reported that he was then placed in a foster home in Willcox, Arizona, where he stayed for approximately six months before his foster parents began having marital problems. He returned home for a brief period of time but continued to have problems with his mother. He then dropped out of school and moved in with his girl friend at her parents' farm, where he started to work for a living. He lived at his girl friend's parents' residence for approximately five or six months before moving into his own apartment in Willcox, Arizona.

Exhibit 7

DECLARATION OF WEAVER BARKMAN, 11 FEBRUARY 2000

DECLARATION OF WEAVER BARKMAN

I, Weaver Barkman, declare as follows:

1. In January of 1982, I was a detective with the Pima County Sheriff's Department. I retired from the Pima County Sheriff's Department on June 24,1995.

2. In 1982, while employed by the Pima County Sheriffs Department, I became involved in the investigation into the murder of Ken Hartsock, a bank branch manager at the Valley National Bank in Marana, Arizona at the time of the robbery.

3. As a result of that investigation, I interviewed Karl LaGrand, a suspect in the bank robbery and murder.

4. On February 28, 1999, Jeannette Laura Sheldon, an investigator for the Federal Public Defender's Capital Habeas Unit interviewed me regarding my interviews of Karl LaGrand.

5. As a result of her interview with me, Ms. Sheldon submitted a Declaration, dated March 3, 1999 (the "Declaration"), summarizing her interview with me.

6. On January 12, 2000 I reviewed the Declaration. After reviewing the Declaration, I determined that some of Ms. Sheldon's Declaration is incorrect.

7. Paragraph six of the Declaration is not accurate wherein it indicates that this case has always disturbed me because I never considered this crime to warrant the death penalty. Whereas my general views on the death penalty may have changed over the years, in 1982 and during the course of the case against Walter and Karl LaGrand for murder, I felt that the crime committed by Walter and Karl LaGrand warranted whatever penalty the Court lawfully imposed, including the death penalty. When it was imposed, I was neither opposed to nor disturbed by it.

8. Had the imposition of the death sentence in the LaGrand matter disturbed me at the time of the proceedings, I would have made my views known. I have done so in the past. In or around 1988, as my currently held views on the death penalty were evolving, I was directly involved in a case wherein two young men had been convicted of a double murder. In that case, prior to sentencing, I talked directly to the prosecutor and expressed my strong beliefs that he should not seek, nor should the court impose, the death penalty.

9. In the case of Walter and Karl LaGrand, I never called the prosecutor to express any doubt as to the seeking of the death penalty.

10. I have no recollection of the citizenship issue being raised either prior to or during the trial.

11. At some point, prior to the trial, I became aware that the LaGrand brothers were purportedly the sons of American servicemen and a German national woman.

12. In 1982, as well as throughout the trial, I was under the impression that anyone residing in the United States whose father was a United States citizen and soldier, was automatically a United States citizen.

13. I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Dated this 11th day of February, 2000.

Weaver Barkman

Exhibit 8

DECLARATION OF EDWARD BETANCOURT, UNITED STATES DEPARTMENT OF STATE, 15 MARCH 2000

DECLARATION OF
EDWARD BETANCOURT, UNITED STATES DEPARTMENT OF STATE

1. I am Edward Betancourt of the United States Department of State. I am the Director of the Office of Policy Review and Inter-Agency Liaison in the Directorate of Overseas Citizens Services of the Department of State's Bureau of Consular Affairs. In this capacity I am responsible for providing advice to consular officers and other U.S. government officials about the performance of consular functions and about a broad range of consular issues, including issues relating to consular notification and access and the transfer of prisoners from a foreign country to their country of nationality to serve their sentence. I also meet regularly with foreign consular officials assigned to the United States about bilateral consular issues.

2. I previously have held a variety of assignments in the Bureau of Consular Affairs that have included responsibility for providing consular assistance and protection to U.S. citizens abroad. I have worked in the Bureau of Consular Affairs since 1974. I make this declaration based on information available to me in my official capacity and through my work for the Bureau of Consular Affairs.

3. I submit this declaration in connection with the Department of State's submission of its Counter-Memorial in the LaGrand Case (*Germany v. United States of America*), brought in the International Court of Justice by Germany

against the United States for an alleged failure by the United States to inform Walter and Karl LaGrand that they could request consular notification, as provided in Article 36 of the Vienna Convention on Consular Relations ("VCCR").

4. My office works closely with U.S. consular officers throughout the world when they encounter situations in which their host country fails to comply with international legal requirements pertaining to consular notification and access. In addition, we work with relevant Department of State offices in responding to complaints from foreign governments arising from alleged failures of consular notification and access in the United States.

5. In connection with assisting U.S. consular officers abroad, the Bureau of Consular Affairs is constantly monitoring the practice of other countries with respect to consular notification and access. We do this primarily by reviewing arrest reports which U.S. consular officers are required to file with the Department with respect to each arrested American abroad who comes to their attention. In 1997, the Department of State additionally undertook a more formal survey of state practice with respect to implementation of consular notification and access requirements. This survey focused both on the degree to which countries comply with such requirements and on how they respond to instances of non-compliance. Since then, the Department has continued to monitor these issues through our arrest reports and occasional specific inquiries to selected overseas posts. The following information reflects the results of our survey and other

information gathered by U.S. diplomatic and consular posts, often through interviews with local or national authorities there, during the years 1997-1999.

6. Our review of State practice showed that compliance with the obligation to notify a foreign national of the right to have a consular post advised of his arrest or detention varies widely from country to country. At one end of the spectrum, some States party seem to comply unfailingly. This is particularly true of States with centralized and efficient governments, and in situations in which foreign nationals are easily identified. At the other end, a small number of States party seem not to comply at all. Compliance seems to be a function in part of such factors as whether a country is large or small, whether it has a unitary or federal organization, the sophistication of its internal communication systems, and the way in which the country has chosen to implement the obligation.

7. Our survey also showed that it is common for consular officers to learn that one of their nationals has been detained independently of the receiving State having informed the national of the right of consular notification. Foreign nationals sometimes already know to ask that their consular officials be notified, and do not need to be told of this possibility. Friends or family members of foreign nationals may notify consular officers of the foreign national's detention. It also is not unusual for diligent consular officers to survey newspaper and other public reports, learn of detentions, and seek to offer assistance.

8. The State practice survey also showed that States party to the Vienna Convention have implemented Article 36 in different ways, including by providing only oral guidance to "competent authorities," by issuing internal directives, and by enacting implementing legislation. Some apparently provide no guidance at all. It appears, for example, that China, Brazil, France, Japan, the Netherlands, Russia, and Sierra Leone, like the United States, do not have implementing legislation, but instead implement the Vienna Convention directly, in some cases through internal directives or regulations. Hungary, on the other hand, reportedly addresses consular notification in its Law on the Entry of Foreigners. The United Kingdom, which does not apply the concept of "self-executing" treaties, also has implementing legislation, and has incorporated the requirement of consular notification into its Police and Criminal Evidence Act.[1]

9. States party have placed responsibility for consular notification in different domestic authorities. Brazil gives the responsibility to arresting officials (police). France provides for consular notification in its penitentiary administration regulations, but notification is also given by the police or the prosecutor. The United States expects both arresting and detaining officials, not prosecutors or judges, to perform the responsibilities of competent authorities. In Germany, the responsibility generally has been given to judicial authorities in cases of arrests, to prison directors in cases of detentions, and

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[1] Police and Criminal Evidence Act 1984, Section 66, Codes of Practice, Code C, paragraph 7.

to prosecutors in certain special situations. Japan places the responsibility on local law enforcement agencies, including police and prosecutors, but apparently uses initial court appearances to confirm that consular notification procedures have been followed (a practice toward which the United States is now seeking to move).

10. Many countries, including the United States, have also entered into bilateral treaties that require notification of consular officers in all cases in which a foreign national is arrested or detained. When Article 36 is the governing standard for consular notification, however, arrested or detained persons do not uniformly ask that their consular officials be notified. A detainee may refuse consular notification for a variety of reasons, including to protect his privacy, because of a general distrust of his own government, or because he considers it unnecessary (*e.g.*, in the case of a long-term assimilated resident). For example, Americans arrested abroad sometimes decline notification, particularly when they are well-rooted in their foreign communities.[2] In the Netherlands, where the individual's right of privacy is highly valued and protected, it apparently is generally assumed that foreign nationals will not want their government to know of

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[2] In a recent case involving a U.S. citizen arrested in Okinawa on December 21, 1999, for example, U.S. consular officials apparently learned of the arrest through a relative of the detainee, and were told by Okinawan officials that the arrested citizen asked that consular officials not be notified. In another case involving a 1998 arrest in Mexico, the U.S. citizen originally did not communicate with U.S. consular officials and concealed his U.S. citizenship because he had violated a probation order in the United States. He finally contacted U.S. consular officials to obtain information about being transferred to the United States to serve his sentence. In November 1999 U.S. consular officers learned of the arrest of a U.S. citizen in Ecuador who deliberately did not seek consular notification.

their arrest. Dutch officials do not notify consular officers of an arrest without the arrestee's explicit permission and often do not ask the foreign national whether he wants notification.

11. If a detainee does request consular notification, or if notification is required regardless of the detainee's wishes under a bilateral agreement, actual notification to a consular post may take some time. Article 36 does not mandate a particular method for communicating with consular officials. In practice, notification may be provided by telephone, facsimile transmission, mailed letter, or diplomatic note. As a result, there may be a significant delay before notification is received, and critical events in a criminal proceeding may take place before a consul learns of the detention or can pay a consular visit. Germany, for example, generally provides notification by mail, and U.S. consular officers typically receive notification seven to ten days after an arrest.[3] In France, while notification is generally prompt, permission to visit must be obtained from the court with jurisdiction over the detainee's criminal case, so that initial consular visits generally take a week to arrange. In Hungary, notification is provided through the Foreign Ministry after local police pass information about a foreign national's arrest via central police authorities. When it works properly, this

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[3] In a November 1999 arrest of a U.S. citizen in Berlin, for example, a letter advising U.S. consular officials of a November 5 arrest was sent on November 11 and received on November 15. In another recent case, a U.S. citizen was arrested in Wiesbaden on September 1, 1999, and U.S. consular officials received notification on September 24, 1999.

process takes about 48 hours. In India, delays in notification and access are common.[4]

12. Whatever procedure for notification is followed, the survey identified no State party to the Vienna Convention that holds its criminal process in abeyance pending consular notification. With the possible exception of certain British cases (discussed below), the survey found no indication that States prohibit the taking of statements or the gathering of evidence from foreign national defendants, or otherwise suspend their criminal investigations, until consular notification is completed or until a consular visit occurs.

13. The fact that criminal justice systems generally operate independently of consular notification reflects the fact that States party characteristically do not expect consular officers to play a direct role in a foreign national's defense. There is no obligation on the sending State to provide any consular assistance to detained nationals, and the ability and inclination of States party to the Vienna Convention to assist their nationals abroad varies widely, reflecting varying policies and resources. In no system are consular officers authorized to act as criminal defense lawyers for their respective nationals.

14. In some countries, consular officers are extremely limited in their ability to communicate with a

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[4] In a case reported in October 1999, consular notification of an August 28, 1999, arrest in India was provided in a written communication dated September 14 and received on September 27. This was followed by a request for access made on September 29 and granted October 18, permitting a consular visit on October 21, 1999.

detained foreign national, particularly prior to the detainee's trial. In China, for example, consular visits are limited to thirty minutes, private consular visits are not allowed, and there can be no discussion of any case-related topic prior to sentencing. In Russia, consular officers must arrange visits through the investigating agency if the case is still in an investigation stage. If the Ministry of Security is investigating, access must be arranged through the Foreign Ministry and, during the visit, the consular officer cannot discuss the case and an investigator must be present. (In other cases freer communication is permitted.)

15. States party have not viewed Article 36 as requiring them to provide remedies in their criminal justice systems for failures to provide required consular notification. Roughly 165 States are party to the Vienna Convention. Nevertheless, the United States' survey did not identify any State that provides a *status quo ante* remedy of vacating a criminal conviction or commuting a sentence for a failure of consular notification. (This is consistent with the fact that Germany has not identified such a country in its Memorial.) Nor have we identified any country that has an established judicial remedy authorizing a foreign government to seek to undo a conviction and sentence through action in domestic courts because of a failure of notification.

16. Indeed, although regrettable, it is the case in many countries that foreign nationals are tried and convicted before consular access occurs. For example, U.S. consular officials learned for the first time in October

1999 of the 1997 arrest of a U.S. citizen in Jamaica who had been sentenced two days prior to the first consular visit. In October 1999, U.S. consular officials were notified of the March 1998 arrest in Canada of a U.S. citizen who had already been sentenced. A U.S. citizen arrested in Australia had already been convicted and sentenced when his girlfriend advised U.S. consular officials of his situation; the detainee reported that he had requested consular notification during the first week of his detention, but it had not been provided. In a recent case in Germany discussed below, a U.S. citizen was tried and convicted before U.S. consular officers learned of his arrest.

17. In the practice of States, the usual remedies for failures of consular notification are political and diplomatic. When a consular officer learns of a failure of notification, a diplomatic communication often is sent protesting the failure. Most States accept a responsibility to investigate the alleged violation and, if necessary, to remind the appropriate "competent authorities" of their obligations. If notification procedures were not followed, it is also common practice for the host government to apologize and to undertake to ensure improved future compliance.

18. This has been the practice both of the United States and of Germany. For example, in a case involving a U.S. citizen arrested and convicted in Germany in 1997, the United States Embassy protested a failure of consular notification. In response, the German Foreign Ministry sent the United States Embassy a note, which is Exhibit 10

to the U.S. Counter-Memorial with which this declaration is submitted. The note was accompanied by a letter from the Office of the Senator for Justice of Bremen acknowledging the requirements of Article 36 and reporting the results of the official investigation into the failure to notify U.S. consular officers. The letter acknowledges that the U.S. citizen may not have been informed of his right to request notification and that the citizen apparently requested notification, but that the competent authorities - in this case, prison officials - forgot to notify consular officials as requested. The letter concludes by apologizing for the error and advising the Embassy of the steps taken to avoid repetition. Neither the German note nor letter suggests that the conviction would in any way be affected by the breach of Article 36. Germany similarly investigated and apologized in another case involving a failure of notification in 1998.[5]

19. The survey of State practice indicates that few if any countries would provide a remedy based directly on the Vienna Convention for a violation of Article 36. In two jurisdictions, Australia and Italy, national courts have denied individuals such a remedy for failure of consular notification in criminal proceedings. These are the *Yater* case, decided in Italy in 1973,[6] and the *Abbrederis* case, decided in Australia in 1981.[7] In both, the question was whether a remedy flowed directly from the

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[5] U.S. Exhibit 11.

[6] Cass. Pen. 19 febbraio 1973, *Yater*, Giur.It., 1974, II, 464.

[7] *R. v. Abbrederis*, (1981) 36 A.L.R. 109.

Vienna Convention itself. In both cases, the court concluded that it did not.

20. A few States, however, could conceivably permit civil law remedies that could be invoked for failure to provide consular notification, and others may offer some remedy for breach of national laws or regulations requiring consular notification. Thus, it was reported that in Germany, it might be possible for a foreign national to seek civil damages from a judge who failed to provide for consular notification, if the foreign national could establish pecuniary damages (although no actual instance of this was identified). In some countries, it may theoretically be possible to obtain orders requiring compliance with the procedures of Article 36. The United Kingdom has provided for consular notification in the Codes of Practice to its Police and Criminal Evidence Act, and Section 78 of the Act authorizes judges to exclude evidence if there has been a violation of the Act. Reading these two statutory provisions together, two trial courts in the United Kingdom apparently decided in 1990 and 1991 to exclude from evidence statements made by foreign nationals who had not been informed previously of their right to request consular notification.[8] These decisions rested not on the Vienna Convention, but on the breach of the U.K. statute.[9]

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[8] R. v. Van Axeland Wezer (1991) 31 May, Snaresbrook Crown Court, HHJ Sich., Reported in Legal Action 12, September 1991; R. v. Bassil and Mouffareg (1990) 28 July, Acton Crown Court, HHJ Sich., Reported in Legal Action 23, December 1990.

[9] In the United States, a somewhat similar result obtained in two cases in which a regulation required consular notification procedures to be followed by the U.S. Immigration and Naturalization Service. Because agencies are required to follow their own regulations, a U.S. appeals

21. State practice regarding transfers of prisoners to their home countries to serve their sentences provides further evidence that Vienna Convention parties have not understood failures of consular notification to invalidate criminal convictions and sentences. Germany and the United States, for example, are both party to the Council of Europe (COE) Convention on the transfer of sentenced persons. The COE Convention, which now has approximately 43 States party, permits the transfer of prisoners to their country of nationality to serve the sentence imposed by the transferring State. The COE Convention includes no provision to adjust sentences based on failures of notification, and at least some of the many prisoners transferred under this and other similar conventions were not informed of the possibility of consular notification prior to sentence. Thus receiving countries are to our knowledge enforcing the sentences regardless of any violations of Article 36 of the Vienna Convention.

22. For example, the United States first concluded such treaties with Mexico and Canada.[10] A number of U.S. prisoners convicted in Mexico when the U.S.-Mexico treaty was negotiated alleged that they had been mistreated, and some had not received consular notification. The Congressional committee that recommended the treaty for

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court held that failure to follow these regulations could entitle a person subject to immigration proceedings to a remedy if prejudice could be found. *United States v. Rangel-Gonzalez*, 617 F.2d 529 (9th Cir. 1980); *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979).

[10] US-Mexico Treaty on the Execution of Penal Sentences, 28 UST 7399, signed Nov. 25, 1976; entered into force Nov. 30, 1977; US-Canada Treaty on the Execution of Penal Sentences, 30 UST 6263, signed March 2, 1977; entered into force July 19, 1978.

ratification by the United States expressly noted that, "in many instances where Americans were arrested, particularly in Mexico, great delay ensued before our consular offices were notified".[11] Yet the treaty with Mexico, like all subsequent prisoner transfer treaties, including the COE treaty, provided for American citizens to continue to serve their Mexican sentences after transfer to the United States.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 15, 2000
(date)

Edward Betancourt

Edward Betancourt

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[11] See Report to accompany S. 1682, Providing implementation of treaties for transfer of offenders to or from foreign countries, H.R. Rept. 95-720, 95th Congress, 1st Session (Oct. 19, 1977).

Exhibit 9

UNITED STATES OF AMERICA V. *NAI FOOK LI ET AL.*,
NOS. 97-2034, 97-2413, 98-1229, 98-1230, 98-1303, 98-1447, 98-1448,
UNITED STATES COURT OF APPEALS (FIRST CIRCUIT),
29 FEBRUARY 2000.
UNITED STATES OF AMERICA V. *JOSE LOMBERA-CAMORLINGA*,
NO. 98-50347, UNITED STATES COURT OF APPEALS (NINTH CIRCUIT),
6 MARCH 2000

United States Court of Appeals
For the First Circuit

No. 97-2034

UNITED STATES,
Appellee,

v.

MAI FOOK LI,
Defendant, Appellant.

No. 97-2413

UNITED STATES,
Appellee,

v.

YIU MING KWAN,
Defendant, Appellant.

No. 98-1229

UNITED STATES,
Appellee,

v.

JU LIN,
Defendant, Appellant.

No. 98-1230

UNITED STATES,
Appellee,

v.

BEN LIN,
Defendant, Appellant.

No. 98-1303

UNITED STATES,
Appellee,

v.

HUI LIN,
Defendant, Appellant.

No. 98-1447

UNITED STATES,
Appellee,

v.

MAO BING MU,
Defendant, Appellant.

No. 98-1448

UNITED STATES,
Appellee,

v.

SANG LI,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert E. Keeton, *U.S. District Judge*]

Before

Torruella, *Chief Judge*,
Selya, Boudin, Lynch, Stahl, and Lipez,
Circuit Judges.

George F. Gormley and Edward P. Ryan, Jr., with whom George F. Gormley, P.C., Paul J. Garrity, O'Connor & Ryan, Chris H. Mangos, Charles W. Rankin, Catherine J. Hinton, Rankin & Sultan, Sara A. Rapport, Perkins, Smith & Cohen, and Heidi B. Shore were on brief for appellants.

William J. Aceves, Martin J. Newhouse, and Ropes & Gray on brief for the Human Rights Committee of The American Branch of the International Law Association, amicus curiae.

Thomas H. Speedy Rice, John T. Lu, Jean Terranova, and Silverglate & Good on brief for the National Association of Criminal Defense Lawyers, Massachusetts Association of Criminal Defense Lawyers and Amnesty International, amicus curiae.

Deborah Watson, Attorney, with whom Donald K. Stern, United States Attorney, Alex Whiting, Assistant United States Attorney, and Susan Hanson-Philbrick, Assistant United States Attorney, were on brief for appellee.

February 29, 2000

OPINION EN BANC

STAHL, Circuit Judge. Defendants-appellants Hui Lin, Nai Fook Li, Yiu Ming Kwan, Ju Lin, Mao Bing Mu, Sand Li, and Ben Lin (the "appellants") appeal their convictions and sentences, which arose from a failed attempt to smuggle Chinese aliens into the United States. This opinion addresses their claim that the convictions and sentences should be overturned because the United States violated their purported rights under two international treaties.[1] We hold that even if the treaties granted individual rights to the appellants, the remedies they seek would be unavailable. Therefore, we reject the treaty-based challenges. A companion opinion issued today by the panel that originally heard the appeals addresses the various other claims raised by the appellants.

Factual Background

In December, 1995, Yiu Ming Kwan, a Chinese national, met in Boston with Michael Rendon, whom he believed owned a boat which could be hired to meet a freighter transporting illegal aliens from the People's Republic of China ("China") to the United States. Rendon was actually an undercover agent of the Immigration and

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[1] It appears that this issue is only relevant to three of the seven appellants. The notices of appeal filed in this case indicated only that the defendants intended to appeal their sentences and, in the case of those who went to trial, the judgments against them. In their opening appellate briefs, appellants Mao Bing Mu, Sang Li, and Ben Lin explicitly presented arguments regarding their purported rights under the two treaties. The remaining defendants -- Hui Lin, Nai Fook Li, Yiu Ming Kwan and Ju Lin -- failed to raise, and therefore forfeited, those arguments. See, e.g., Pignons v. Polaroid Corp., 701 F.2d 1, 3 (1st Cir. 1983) (finding arguments not raised in initial appellate brief waived).

Naturalization Service ("INS"). At the first meeting, Kwan told Rendon that his associates wished to smuggle about 100 illegal aliens into the United States. Rendon proposed a price of $500,000 to meet the smugglers' ship at sea, take in the aliens, and bring them into the United States on his vessel. After this preliminary discussion, Kwan asked Rendon to meet him and two associates at Logan International Airport the following day.

The next day, Rendon, along with Coast Guard Agent Rick Cox and two other agents, brought Kwan, Hui Lin, and another male -- the latter two also Chinese nationals -- to view Rendon's craft. The vessel had a fifty-foot hold with a single light and a partial wooden plank floor. The hold contained no tables, chairs, windows, bathroom, or kitchen. The smugglers told the agents they were satisfied with the boat's accommodations.

On July 22, 1996, Rendon and Cox met with Kwan, Hui Lin, Nai Fook Li, and an unidentified man. At this meeting a site about 180 miles north of Bermuda was chosen as a rendezvous point. A discussion ensued about the spartan conditions in the hold of Rendon's vessel, and Hui Lin stated that the aliens "will have to sit there" and would not be able to sleep for the two days it would take for the craft to return to port. Nai Fook Li told Rendon that life jackets for each smuggled alien would not be necessary. Rendon sought and received assurances that the smugglers would assign individuals to his ship to control the aliens. A final price of $500,000 was agreed upon for the offloading of 120 aliens, plus $4,000 for each additional person. The smugglers also agreed to pay a $35,000 deposit to cover Rendon's expenses.

Meanwhile, defendant Sang Li and others contacted individuals in China offering passage to the United States. Sang Li quoted prices between $20,000 and $30,000 per person, to be lent to the emigrants at very high interest rates. On or about August 11, 1996, those who took up the offer were loaded into the XING DA, a 210-foot freighter that had previously carried agricultural chemicals. Among the passengers were Sang Li, Mao Bing Mu, Ju Lin, and Ben Lin.

Eighty-three aliens were confined to the XING DA's hold for approximately 54 days as the ship traveled to the Bermuda rendezvous. Food in the hold consisted of buckets of rice and turnips lowered below twice each day. About once every ten days, each emigrant was given one bottle of water. The aliens were allowed above deck to use the bathrooms only during the daytime. The living area, which was never cleaned, thus became littered with urine and feces. Apparently, Sang Li and Mao Bing Mu directed one of the aliens on four or five occasions to ladle the human waste into a bucket. Several times, aliens in the hold attempted to steal additional food and water. Those who were caught were beaten. One alien as punishment was denied food for two days. Twenty-six of the passengers lived above deck.

Kwan kept Rendon apprised of the XING DA's position. On September 23, 1996, Rendon and Cox met with Kwan, Hui Lin, and Nai Fook Li. Li gave Cox the XING DA's current location and told him

that approximately 120 people would be transferred from the XING DA to Rendon's vessel. Li agreed to board Rendon's vessel to help control the passengers. The men met again on September 25, 1996 and decided that Rendon's vessel would leave port on September 28 to meet the XING DA. Lin gave $5,000 to Nai Fook Li, who then gave it to Rendon to be used to obtain temporary shelter for the passengers upon arrival in the United States. At Cox's request, Hui Lin provided him another $1,000 for food. On September 27, 1996, the five men met again, and Hui Lin gave Rendon $29,000 to complete the deposit. It was agreed that the aliens would live in a warehouse until the defendants had paid the remainder of the $500,000 to Rendon, at which time the aliens would be taken to New York City.

On September 28, 1996, Rendon, Cox, Nai Fook Li, and four undercover agents apparently posing as Rendon's crew departed in the vessel heading for the rendezvous with the XING DA. The agents also had arranged for a Coast Guard cutter to trail their boat and intercept the XING DA.

On October 2, 1996, a different Coast Guard cutter -- the RELIANCE -- spotted the XING DA and followed it for about three miles. After the RELIANCE crew attempted to make contact several times, the XING DA finally responded and consented to be boarded by the Coast Guard. Officer Patrick Hilbert and seven other Coast Guard officers boarded the XING DA. When Hilbert asked who was in charge, Ju Lin represented that he was the ship's master. After

Hilbert viewed the ship's documentation, a second boarding party came on board and discovered the eighty-three aliens in the hold.

The XING DA was taken to Bermuda. During this trip, the XING DA's crew retained operational control, and Ben Lin steered and handled the navigation. All aboard the XING DA were offloaded in Bermuda and flown to Guantanamo Bay, Cuba, where they were interviewed by INS officers. During the week of November 18, 1996, after negotiations between the United States Department of State and the government of China, ninety-three aliens were repatriated and returned to China.

Meanwhile, on October 3, 1996, Hui Lin, Yiu Ming Kwan, and Nai Fook Li (the "land-based defendants") were arrested, and on October 8, 1996, an indictment was returned against them. On November 5, 1996, a superceding indictment was returned, adding Ju Lin, Ben Lin, Mao Bing Mu, and Sang Li (the "shipboard defendants") as defendants. The shipboard defendants, who had been detained at Guantanamo, were arrested on November 15, 1996 and were provided with counsel five days later. A final superceding indictment was issued on March 18, 1997, charging all defendants with (1) conspiracy to bring aliens into the United States for purposes of commercial advantage, in violation of 18 U.S.C. § 371; (2) alien smuggling in violation of 8 U.S.C. § 1324(a)(2)(B)(ii); (3) conspiracy to bring aliens into the United States at a place other than a designated port of entry in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(II); and (4) attempting to bring aliens into the

United States at a place other than a designated port of entry in violation of 8 U.S.C. §§ 1324(a)(1)(A)(i), (v)(II).

On March 27, 1997, all seven defendants moved to dismiss the indictment on the grounds that the government failed to comply with the provisions of (1) Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, 1967 WL 18349 (ratified November 24, 1969) (the "Vienna Convention") and (2) Article 35 of the United States - People's Republic of China Bilateral Convention on Consular Relations, September 17, 1980, 33 U.S.T. 2973, 1982 WL 212240 (ratified February 19, 1982) (the "Bilateral Convention"). The shipboard defendants subsequently moved, on the same grounds, to suppress (1) all physical evidence seized from the XING DA; (2) all identifications made by any Chinese national who had not been notified of his or her purported rights under the treaties; and (3) all testimony regarding the events of the voyage by any Chinese national who had not been notified of his or her rights under the treaties.

On April 3, 1997, the district court denied the appellants' motions to dismiss and to suppress. First, the district court found that the treaties bestowed no enforceable rights upon individual detained aliens. Second, the court found that no constitutional or statutory provision conferred jurisdiction to enforce the treaties upon Article III courts. Third, the district court concluded that even if the appellants had standing to enforce the treaty, dismissal of the indictment would be an inappropriate remedy.

Defendants Nai Fook Li, Yiu Ming Kwan, Hui Lin and Ju Lin each pled guilty to all four counts but reserved their rights to appeal the pretrial rulings. Following a twelve-day jury trial, defendants Ben Lin, Mao Bing Mu, and Sang Li were convicted on all four counts. The defendants were individually sentenced, with terms of imprisonment ranging from 36 months to 144 months, plus supervised release of 36 months each. All appellants challenged their sentences, and those defendants who went to trial contested their convictions as well. Although the appellants raise various arguments, we deal in this en banc opinion solely with those relating to the alleged violations of the Vienna Convention and the Bilateral Convention.

A three-member panel of this Court heard oral argument on April 6, 1999. On August 6, 1999, before the panel released an opinion, we issued a sua sponte order holding that the court would convene en banc to decide two issues related to the treaties:

> (1) Whether the Vienna Convention . . . and/or the . . . Bilateral [Convention] create individual rights as to consular notification and access, that are enforceable by such individuals in court proceedings, and
>
> (2) If so, is there a remedy (such as suppression of evidence or dismissal of the [indictments]) for past violations of these rights that can be invoked by a defendant in a criminal prosecution in a federal or state court?

Discussion

Those courts that have faced the issues before us have come to divergent conclusions as to whether the Vienna Convention and the Bilateral Convention bestow any rights upon individuals, as opposed to states. We need not, however, address these issues, for we believe that even if the treaties do confer individual rights, the appellants' claims could only succeed if violations of those rights could be remedied by the suppression of evidence or the dismissal of an indictment. We hold that irrespective of whether or not the treaties create individual rights to consular notification, the appropriate remedies do not include suppression of evidence or dismissal of the indictment.[4]

I. The Treaties

Article 36(1)(b) of the Vienna Convention states that the authorities of a "receiving state" -- in this case, the United States -- shall, without delay, inform any detained foreign national of his right to have the consular post of the "sending state" -- in this case, China -- notified of his detention. Vienna Convention, art. 36(1)(b). Article 36(1)(c) gives consular officers the right to visit and correspond with the detained foreign national and to arrange for his legal representation. See id. art. 36(1)(c).

Article 35(2) of the Bilateral Convention states that if a foreign national is detained, the authorities of the receiving state shall, within four days of the date of detention, notify the consulate of the sending state. *See* Bilateral Convention, art. 35(2). Moreover, the receiving country's authorities are required to advise the detainee of his right to communicate with a consular officer. *See id.* art. 35(3). The Bilateral Convention further guarantees a consular official's entitlement to visit and correspond with the detainee and to assist in arranging for legal representation and for an interpreter. *See id.* art. 35(4).

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[4] We do not decide whether a federal court could order access to a national denied a meeting with a consular official.

II. Interpreting the Treaties

The United States Constitution provides that ratified treaties are to be regarded as the law of the land. *See* U.S. Const. art. VI, cl. 2. However, treaties do not generally create rights that are privately enforceable in the federal courts.

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress. . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Head Money Cases, 112 U.S. 580, 598 (1884); *see also Charlton* v. *Kelly*, 229 U.S. 447, 474 (1913); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 306 (1829) ("The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided."). "[E]ven where a treaty provides certain benefits for nationals of a particular state . . . it is traditionally held that any rights arising from such provisions are, under international law, those of states and . . . [that] individual rights are only derivative through the states." Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990) (quoting United States ex. rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975)) (internal quotation marks omitted); see also Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992); Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937-38 (D.C. Cir. 1988).

Even stronger than the presumption against private rights of action under international treaties is the presumption against the creation of rights enforceable by the suppression of evidence or by the dismissal of an indictment. Historically, such remedies have been available only in cases implicating the most fundamental of rights. This class has heretofore been limited to those paramount protections secured by the Fourth, Fifth, and Sixth Amendments to the United States Constitution. See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966) (Fifth Amendment); Massiah v. United States, 377 U.S. 201 (1964) (Sixth Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment); see also United States v. Hensel, 699 F.2d 18, 29 (1st Cir. 1983) (observing that the exclusionary rule is designed "to protect certain specific, constitutionally protected rights"); United States v. Rodrigues, 68 F. Supp. 2d 178, 185 (E.D.N.Y. 1999) ("[A]s the effect of [suppression] is the loss of relevant and probative evidence, this remedy is not applied for every violation of a federal law but is reserved only for breaches of the most basic constitutional rights.").

Article 36 of the Vienna Convention, and the complementary Article 35 of the Bilateral Convention, do not create -- explicitly or otherwise -- fundamental rights on par with the right to be free from unreasonable searches, the privilege against self-incrimination, or the right to counsel. See, e.g., United States v. Ademaj, 170 F.3d 58, 67 (1st Cir. 1999) ("[T]he Vienna Convention itself prescribes no judicial remedy or other recourse for its violation."); Waldron v. INS, 17 F.3d 511, 518 (2d Cir. 1993) ("Although compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights."); United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1125 (N.D. Ill. 1999) ("It is clear that Article 36 does not create a 'fundamental' right, such as the Sixth Amendment right to counsel, or the Fifth Amendment right against self-incrimination which originates from concepts of due process."). Defendants who assert violations of a statute or treaty that does not create fundamental rights are not generally entitled to the suppression of evidence unless that statute or treaty provides for such a remedy. See, e.g., United States v. Thompson, 936 F.2d 1249, 1252 (11th Cir. 1991) ("Absent a specific reference to an exclusionary rule, it is not appropriate for the courts to read such a provision into [an] act."); United States v. Kington, 801 F.2d 733, 737 (5th Cir. 1986) (holding that rights created by Congress are not enforceable by suppression unless Congress has specifically provided for that remedy); Chaparro-Alcantara, 37 F. Supp. 2d at 1125 ("[Article 36] does not create a 'fundamental' right," and therefore "the suppression remedy must be available, if at all, from the Vienna Convention itself.").

Nor are such defendants entitled to the dismissal of an indictment: "Because the public maintains an abiding interest in the administration of criminal justice, dismissing an indictment is an extraordinary step." United States v. Stokes, 124 F.3d 38, 44 (1st Cir. 1997); see also United States v. Morrison, 449 U.S. 361, 365 (1981) (concluding that the dismissal of an indictment was unwarranted absent a constitutional violation that prejudiced defendant's case); Whitehouse v. United States Dist. Court, 53 F.3d 1349, 1359 (1st Cir. 1995) ("When a federal court uses its supervisory power to dismiss an indictment it directly encroaches upon the fundamental role of the grand jury. That power is appropriately reserved, therefore, for extremely limited circumstances."); United States v. Carrillo, 70 F. Supp. 2d 854, 862 (N.D. Ill. 1999) (holding that violation of Vienna Convention would not require suppression of evidence or dismissal of indictment). Thus, we will infer neither an entitlement to suppression nor an entitlement to dismissal absent express, or undeniably implied, provision for such remedies in a treaty's text. We find no such provision here.

A. The Treaties' Texts

"In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning." United States

v. Alvarez-Machain, 504 U.S. 655, 665 (1992); see also Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534 (1991); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988); Marquez-Ramos v. Reno, 69 F.3d 477, 480 (10th Cir. 1995); Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 638 (5th Cir. 1994). But the Vienna Convention and the Bilateral Convention are both facially ambiguous on the subject of whether they create individual rights at all, and do not even address whether those rights would justify suppression of evidence or the dismissal of an indictment. First, it is far from clear that the Vienna Convention confers any rights upon criminal defendants. Cf. Breard v. Greene, 118 S. Ct. 1352, 1356 (1998) ("[N]either the text nor the history of the Vienna Convention clearly provides a . . . right of action in United States' courts to set aside a criminal conviction and sentence for violation of consular notification provisions."). The appellants emphasize the privileges purportedly conferred by Article 36, but the Vienna Convention's preamble explicitly disclaims any attempt to create individual rights: "[T]he purpose of such privileges and immunities [as are created by the treaty] is not to benefit individuals but to ensure the efficient performance of functions by consular posts." Preamble to Vienna Convention, 21 U.S.T. 77, 79. Moreover, the preamble's drafters cite an intent to "contribute to the development of friendly relations among nations" without ever mentioning any intent to equip defendants with the extraordinary remedies sought by appellants. Id.

The Bilateral Convention, too, is ambiguous. Article 35 is replete with references to consular officers' entitlements, see Bilateral Convention arts. 35(1), 35(4), 35(5), 35(6), but only once speaks of the "rights" of detained nationals, and never proposes any particular remedies for the violation of any such rights. Article 35(3) reads as follows:

> The competent authorities of the receiving state shall immediately inform the national of the sending State of the rights accorded to him by this Article to communicate with a consular official.

This language, however, offers insufficient support for appellants' arguments. Even if we were to hold that Article 35(3) in fact provided individuals with judicially enforceable rights -- and we decline to so hold in this case -- this language hardly justifies the inference that violation of such rights should be remedied via the suppression of evidence or the dismissal of an indictment. As described above, these remedies are reserved for extraordinary encroachments upon the most fundamental individual rights. Nothing in Article 35(3) of the Bilateral Convention suggests that the "rights" to which it refers are at all comparable to the right to be free from unreasonable searches and seizures, the privilege against self-incrimination, or the right to representation during a criminal proceeding.

Indeed, the balance of Article 35 clearly mitigates any focus on the individual that section (3) might suggest. Even those provisions that arguably serve the interests of criminal defendants are couched instead in terms of the interests of the consular officer. Thus, for example, Article 35(1) provides that "[a] consular officer shall be entitled . . . to communicate and meet with any national of the sending State," and Article 35(4) states that "[a] consular officer shall be entitled to visit a national of the sending State who has been arrested." We believe that if the authors of the Bilateral Convention intended Article 35 to confer fundamental individual rights of the sort that could be remedied by suppression or dismissal, they would have drafted that Article in terms of those rights, rather than focusing so intently upon the entitlements of consular officers -- officers whose protections under such a clause would be far less reaching than those of criminal detainees.

B. Nontextual Sources

To the extent that the treaties' terms are ambiguous with respect to the issue before us, we will rely upon nontextual sources "such as the treaty's ratification history and its subsequent operation." United States v. Stuart, 489 U.S. 353, 366 (1989).

1. State Department Interpretation

We first consult the United States Department of State's interpretation of the two treaties, to which we accord substantial deference. See, e.g., El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 119 S. Ct. 662, 671 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 185 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961) (same).

In the State Department's view, the treaties do not create individual rights at all, much less rights susceptible to the remedies proposed by appellants. After "devot[ing] considerable time to the issue," *see* Department of State Answers to the Questions Posed by the First Circuit in United States v. Nai Fook Li ("Answers") at A-2, the State Department has concluded that

> [t]he [Vienna Convention] and the US-China bilateral consular convention are treaties that establish state-to-state rights and obligations . . . . They are not treaties establishing rights of individuals. The right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned.

Id. at A-3; *see also id.* at A-1. "The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *See id.* at A-3.[3]

Nor is the State Department's position of recent origin. A 1970 letter sent by a Department legal adviser to the governors of the fifty states shortly after the Vienna Convention's ratification advised that the Department did "not believe that the

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[3] However, elsewhere in its responses to the court's inquiries, the State Department acknowledged that "[t]he question whether an individual could enforce consular notification obligations in some other way, such as through a mandamus action" -- a question we decline to consider here -- "is not [one it] has had to address officially." Answers at A-6.

Vienna Convention will require significant departures from the existing practice within the several states of the United States." Needless to say, the creation of rights on par with those guaranteed by the Fourth, Fifth, and Sixth Amendments to the United States Constitution would constitute just the sort of "significant departure[]" disclaimed by this letter. Accordingly, the Department has denied the availability of criminal remedies for failures of consular notification. In 1989, a letter from a Department legal adviser informed a foreign national being held in an American prison that "[w]hile the U.S. authorities are required to comply with the obligations [of Vienna Convention Article 36], failure to do so would have no effect on [his] conviction or incarceration."

Moreover, the State Department has advanced the same view before at least two international tribunals. In 1998, Paraguay brought suit against the United States in the International Court of Justice ("ICJ"). Paraguay, which sought to halt the execution of a Paraguayan national named Angel Breard in the Commonwealth of Virginia, argued that Breard had not received consular notification and that his conviction was therefore tainted. In an oral presentation to the ICJ, a State Department Assistant Legal Adviser for United Nations Affairs offered the following response:

> Paraguay's Application maintains that the necessary legal consequence for any . . . breach [of the consular notification obligation] is that [an] ensuing conviction and sentence must be put aside. There is absolutely no support for this claim in the language of the [Vienna] Convention. The Court should not read into a clear and nearly

> universal multilateral instrument such a substantial and potentially disruptive additional obligation that has no support in the language agreed by the parties.

Verbatim Record (Paraguay v. U.S.), 1998 I.C.J. 426, at 3.20.

The issue also arose in the Inter-American Court of Human Rights ("IACtHR") in 1998, when Mexico sought an advisory opinion on the availability of criminal remedies for failures of consular notification.[4] In a written submission to the IACtHR, counsel for the State Department argued that the Vienna Convention "does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation." Written Observations of the United States of America, Request for Advisory Opinion OC-16, June 1, 1998 (corrected June 10, 1998).

2. Legislative History

Legal materials produced contemporaneously with the two treaties' passages comport with the State Department's view that they do not confer rights the violation of which can be remedied in the criminal courts. For example, a State Department legal adviser submitted written testimony on the Vienna Convention to the Senate Committee on Foreign Relations on October 7, 1969. The statement indicated that "[t]he Vienna . . . Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions," except with respect to a warrant requirement not relevant here. The Department's testimony also emphasized the Vienna Convention's above-quoted preamble, which states explicitly that the treaty's purpose is "not to benefit individuals." Appendix, Sen. Doc. Exec. E, 91st Cong., 1st Sess. (1969).

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[4] The United States is not a party to the treaty that formed the IACtHR, and is not bound by that court's conclusions. Nonetheless, as a member of the Organization of American States ("OAS"), the United States may participate in the IACtHR's advisory proceedings.

Two weeks later, the Senate Committee on Foreign Relations transmitted the Vienna Convention to the full Senate and recommended ratification. Committee Chairman Senator J. William Fulbright included a short accompanying Report. The Report again highlighted the treaty's preamble and then listed five factors that helped to secure the Committee's approval. The first factor was the Committee's belief that "[t]he [Vienna] Convention does not change or affect present U.S. laws or practice." Sen. Doc. Exec. E, 91st Cong., 1st Sess. (1969).

The Committee on Foreign Relations appended a similar Report when it sent the Bilateral Convention to the full Senate in 1981. Like the treaty itself, the Report characterized Article 35 only in terms of the entitlements bestowed upon consular officials:

> Article 35 . . . guarantees that a consular officer of a sending state will be notified within a maximum of four days of the arrest or detention of a national of the sending state. The consular official is further entitled to visit such national within two days from the date of the notification of arrest or detention as well as to attend the trial of such person.

Sen. Exec. Rep. No. 97-14, 97th Cong., 1st Sess (1981).[5] The Committee appended to the Report testimony from Assistant Secretary of State John H. Holdridge, who also cast the treaty's consular notifications provisions in terms of the privileges conferred upon consular officials, rather than upon criminal defendants. See id.

3. The Treaties' Historical Application

Finally, the manner in which the Vienna Convention and the Bilateral Convention have been treated since their ratification confirms the lessons learned from the State Department's interpretation and the treaties' legislative histories: Individual defendants deprived of consular notification are not entitled to raise their treatment as a defense against criminal prosecution.

Indeed, the State Department is apparently "unaware of any country party to any consular convention with the United States that remedies failures of notification through its criminal justice process. Criminal justice systems vary throughout the world and in [the State Department's] experience operate independently of consular notification." Answers at A-1. "Many, if not most, of the countries with which the United States raises concerns that consular notification obligations have been violated with respect to U.S. citizens will undertake to investigate the alleged violation and, if it is confirmed, to apologize for it and undertake to prevent future recurrences." Id. at A-3. This representation accords with that made to the ICJ by the State Department's Assistant Legal Adviser for Consular Affairs during the dispute with Paraguay described above. She stated that the Department was "not aware of any practice [among signatories to the Vienna Convention] of attempting to ascertain whether [a] failure of notification prejudiced the foreign national in criminal proceedings." Verbatim Record (Paraguay v. U.S.), 1998 I.C.J. 426, at 2.15. As she asserted, "[t]his lack of practice is consistent with the fact and common international understanding that consular assistance is not essential to the criminal proceeding against a foreign national." Id.

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[5] We emphasize that this history casts further doubt on any argument that Article 35(3)'s stray reference to detainees' "rights" conferred fundamental protections of the sort that can be vindicated by suppression of evidence or the dismissal of an indictment. We do not believe that the committee would choose to focus on consular rights and yet neglect to mention the creation of new fundamental rights for criminal defendants if Article 35 in fact created such rights.

The Department's written directives to United States consular officers are also instructive. The Foreign Affairs Manual ("FAM") urges United States consular officials aggressively to pursue contact with American nationals detained abroad, and to raise concerns about failures of consular notification with the receiving country. See 7 FAM 410. Nowhere, though, does the FAM state or imply that such failures might be redressed in the host country's criminal justice system. Thus, the United States has never, to the Department's knowledge, asked a foreign court to consider a failure of consular notification during deliberation on a criminal case. These practices evidence a belief among Vienna Convention signatory nations that the treaty's dictates simply are

not enforceable in a host nation's criminal courts, and do not warrant suppression or dismissal in any event.

Conclusion

The remedies sought by appellants are unavailable to them under either the Vienna Convention or the Bilateral Convention. Therefore, irrespective of whether those treaties create individual rights, the defenses asserted must be denied.

The appellants' treaty-based challenges are rejected, and the balance of this case is remitted to the panel.

Separate opinions follow.

SELYA and BOUDIN, Circuit Judges (concurring). Judge Stahl's sterling opinion for the en banc court properly lays stress on the lack of basis for the principal remedy sought in these cases. That remedy — the exclusion of otherwise legitimate evidence — is nowhere suggested in the treaties at issue and courts ordinarily do not provide such remediation in the absence of a constitutional violation. The record before us offers no meaningful reason to stray from that well-trod path. Thus, we join the court's opinion. We write separately, however, because we believe that, even without reaching the remedy question, the appellants' argument lacks force.

We arrive at this position essentially by drawing logical conclusions from many of the same considerations that are noted in the court's opinion. It is common ground that the treaties in question are agreements among sovereign States. Nothing in their text explicitly provides for judicial enforcement of their consular access provisions at the behest of private litigants. Of course, there are references in the treaties to a "right" of access, but these references are easily explainable. The contracting States are granting each other rights, and telling future detainees that they have a "right" to communicate with their consul is a means of implementing the treaty obligations as between States. Any other way of phrasing the promise as to what will be said to detainees would be both artificial and awkward.

Even if such references sufficed to make the treaties ambiguous as to an intent to create private rights — an assumption that we believe is unwarranted and that we indulge solely for argument's sake — the end result would be the same. Ambiguity brings into play the background presumption in respect to treaties between States — a presumption which holds that they *do not* create rights that private parties may enforce in court. *See, e.g., Goldstar* v. *United States*, 967 F.2d 965, 968 (4th Cir. 1992); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring). This presumption certainly can be overcome by explicit language that is easy to draft and to insert, just as a contract can provide expressly that rights created by it may be enforced in court by a third-party beneficiary. In addition, rights-granting language occasionally may make sense only on the premise that it confers a right enforceable by a private citizen in the courts of the other country. *See, e.g., Clark* v. *Allen*, 331 U.S. 503, 507-08 (1947) (dealing with language that involved non-citizens' rights to inherit property equally with citizens). But apart from these narrow circumstances, the presumption rules.

In this instance, the treaties contain no explicit language conferring on private citizens rights enforceable in court, and there is nothing in the character of the subject matter that compels (or even suggests) an inference in favor of private rights. To the contrary, it is entirely reasonable to think that States themselves will enforce their right to afford consular access to detained citizens; after all, States normally seek to protect their own citizens in foreign lands and consular access facilitates a State's carrying out of that responsibility. *Cf.*

Preamble to Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 79 (ratified Nov. 24, 1969) (describing treaty as ensuring "efficient performance of functions of consular posts"). In sum, there is every incentive to treat the background presumption as the reality in these cases — and no viable rationale for disregarding it.

The other very powerful reason for reaching this conclusion is that the State Department in substance supports it. As we have held in other cases, the State Department's view is entitled to substantial weight in treaty interpretation. See United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir.), stay denied, 520 U.S. 1206 (1997). This is true partly because the State Department negotiates and administers such treaties, but it is also true partly because, when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice. That voice is the voice of the State Department, which in such matters speaks for and on behalf of the President.

The background presumption that treaties do not create privately enforceable rights and its corollary — that the State Department's view to this effect will receive respectful consideration — are extremely important principles that reverberate far beyond these cases. We believe that those principles warrant our adherence and our support.[1] This is especially so because, in a shrinking world, the number of treaties to which the United States is a party has proliferated. It is surpassingly difficult to accept the idea that, in most instances, either the Executive Branch or the ratifying Senate imagined that it was empowering federal courts to involve themselves in enforcement on behalf of private parties who might be advantaged or disadvantaged by particular readings of particular treaty provisions.

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[1] We do not gainsay that, on grounds of policy, there may well be reasons for Congress to give special private rights to foreign detainees above and beyond those conferred upon their American

Our dissenting brother's emphasis on the self-executing character of the treaties in question does not sway our thinking. The label "self-executing" usually is applied to any treaty that according to its terms takes effect upon ratification and requires no separate implementing statute. See Restatement (Third) of Foreign Relations Law § 111(4) (1987). Whether the terms of such a treaty provide for private rights, enforceable in domestic courts, is a wholly separate question.[2] See id. at § 111, cmt. h.

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counterparts; the former are likely to enjoy fewer local advantages of language, resources, and friends. But the way remains open to such adjustments through domestic legislation enacted by Congress or, reciprocally, through treaties, negotiated by the State Department and ratified by the Senate, that explicitly provide for private judicial enforcement. No such intended adjustment can be found in the situation at hand.

[2] The dissent relies on dictum from United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992), for the proposition that treaties that are "self-executing" in the usual sense are necessarily enforceable in domestic courts at the behest of affected individuals. In that case, however, the nature of the right being asserted (which arose out of a claimed violation of an extradition treaty) was at least arguably personal, see United States v. Rauscher, 119 U.S. 407, 424, 430-31 (1886); see also United States v. Saccoccia, 58 F.3d 754, 767 n.6 (1st Cir. 1995) (discussing differing views of that issue), so the question of self-execution quite likely would have been decisive if the treaty had in fact been violated. To enlarge the Court's cryptic dictum into a general rule, contrary to the well-established principles

That courts sometimes discuss both concepts together, see, e.g., Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988), does not detract from their distinctiveness. At bottom, the questions remain separate. See id. at 937-38. It follows inexorably that the self-executing character of a treaty does not by itself establish that the treaty creates private rights.

We need go no further. There is an elaborate regime of practices and institutions by which the United States and other nations enforce commitments inter sese or decide that, in the national interest, promises given by or to another sovereign should not be enforced in a specific case. Sometimes this is done purely for reasons of prudence, sometimes for convenience, or sometimes to secure advantage in unrelated matters. Incalculable mischief can be wrought by gratuitously introducing into this often delicate process court enforcement at the instigation of private parties. We believe that such a course is to be avoided unless it can be said that private enforcement was clearly agreed to and envisioned by the contracting States in the treaties themselves. That is plainly not the case here.

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discussed above, requires much too great a stretch.

TORRUELLA, *Chief Judge* (concurring in part; dissenting in part). I concur with the majority opinion in affirming the judgment of conviction of appellants Hui Lin, Nai Fook Li, Yiu Ming Kwan, and Ju Lin. These appellants failed to preserve for appeal, their rights under Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S.261, 1967 WL 18349 (ratified November 24, 1969) (hereinafter "Vienna Convention") and Article 35 of the United States - People's Republic of China Bilateral Convention on Consular Relations, September 17, 1980, 33 U.S.T. 2973, 1982 WL 212240 (ratified February 19, 1982) (hereinafter "Bilateral Treaty"). *See*, *e.g.*, *Breard* v. *Greene*, 118 S. Ct. 1352, 1354-55 (1998) (appellant procedurally defaulted his claim under the Vienna Convention by not raising and preserving the issue). However, such is not the case with respect to appellants Mao Bing Mu, Sang Li, and Ben Lin (hereinafter referred to collectively as the "appellants"). They did raise and preserve for appeal the issues before us regarding Article 36 of the Vienna Convention and Article 35 of the Bilateral Treaty. It is as to them and those issues that I respectfully disagree with my colleagues in the majority.

It is my view that the Government of the United States failed to comply with Articles 36 and 35, respectively, in not advising appellants upon their detention of their right to consular assistance. These provisions, once ratified by the Senate, constitute self-executing municipal law of the United States, which is individually enforceable in the courts of this country

upon proper request by an affected detainee. Notwithstanding this conclusion, because the record has not been fully developed as to the possible prejudice that may have been suffered by appellants by reason of the violation of their rights, I would remand this case to the district court for an inquiry into these matters. Furthermore, if prejudice is found, the district court is initially in a better position to fashion a remedy, and I would thus defer to such a finding in the first instance.

Because such is my opinion, the thrust of my comments are directed to the first of the two issues for which the en banc court was convened: whether the Vienna Convention and/or the Bilateral Treaty create individual rights to consular notification and access that are enforceable by such individuals in court proceedings. *Cf.* *Breard* v. *Greene*, 118 S. Ct. at 1355 (the Vienna Convention "[a]rguably confers on an individual the *right* to consular assistance following arrest") (emphasis supplied).

I. Individual Rights Were Created By The Vienna Convention and The Bilateral Treaty

Although our Nation is one in which the rule of law is cherished in action as well as principle, and the maxim *pacta sunt servanda* has flourished, most courts facing claims such as are before us have side-stepped the enforcement of the rights established under the Vienna Convention and Bilateral Treaty, even in the face of finding a violation of treaty obligations entered into by the United States. *See* *Faulder* v. *Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) ("Texas admits that the Vienna Convention was violated"); Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) ("Virginia's persistent refusal to abide by the Vienna Convention troubles the Court"). This Court has unfortunately chosen to follow suit.

The ensuing colloquy took place before the panel originally hearing this appeal:

> The Court: Does it [the Vienna Convention] require that the individual be notified immediately?
>
> Government Counsel: Well, yes it does. There is no question that this treaty was violated in this instance and the United States is not saying that it wasn't violated. We are simply saying that no court has granted a defendant any kind of relief in the absence of a showing of prejudice.

Oral Argument of April 6, 1999. Government counsel's frankness in admitting the obvious is commendable, although more recently the Justice Department seems to have retrogressed from this position, and, as is apparent from the majority opinion, the concessions made at oral argument are for naught.[1]

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[1] The chronology of events as to appellants was as follows:

October 2: The M/V Xing Da was intercepted in international waters by the U. S. Coast Guard, and appellants were detained after boarding by Coast Guard personnel.

October 9: Appellants were offloaded in Bermuda and flown to the U.S. Naval Base in Guantánamo, Cuba, where they continued to be held in detention and were interrogated by officers of the U.S. Immigration and Naturalization Service.

October 19: Appellants were transferred to Wake Island and continued in detention.

November 5: A superseding indictment was returned which included appellants.

November 13: Appellants left Wake Island, still under detention.

At least part of the majority's confusion stems from its basic misconception as to the nature of the rules that are before the Court. We are no longer merely considering international agreements to be administered or enforced at the discretion of the State Department, in which its interpretation as to applicability is entitled to special expertise or deference. *Cf.* *United States* v. *Stuart*, 489 U.S. 353, 369 (1989) ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight"). As will be further elucidated, once ratified by the Senate, both the Vienna Convention and the Bilateral Treaty became the municipal law of the United States pursuant to the Supremacy Clause,[2] and its provisions enforceable in the courts of the United States at the behest of affected individuals without the need for additional legislative action.

November 14: Appellants and witnesses arrived in Hawaii.
November 15: Appellants were formally arrested.
November 16: Appellants and witnesses arrived in Boston.
November 18: 93 other passengers and crew were repatriated to China from Wake Island. A final superseding indictment was issued. Appellants had their initial appearance in Boston.
November 20: Appellants were assigned counsel.

At no point during this almost fifty-day ordeal were appellants notified of their right to consular notification and access.

[2] U.S. Const. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

II. The Self-Execution of Treaties in the United States

In stating the "general rule" that treaties do not create individually enforceable rights, the majority completely ignores the well-established doctrine of self-execution. See, e.g., United States v. Green, 671 F.2d 46, 50 (1st Cir. 1982). I recognize that the interplay between the general rule and the doctrine of self-execution has been confused over the years, but that confusion stems from the failure to take into account the origins of the doctrine of self-execution as well as the reasoning that led to its creation. See generally Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l 695, 699 (1995).

The general rule has its roots in English law. See J.G. Starke, Introduction to International Law 81-82 (10th ed. 1998); J.G. Collier, Is International Law Really Part of the Law of England?, 38 Int'l & Comp. L.Q. 924, 925-26 (1989) (citing The Parliament Belge, 4 P.D. 129 (1879)); see also Ware v. Hylton, 3 U.S. (3 Dall.) 256, 274- 275, rev'd on other grounds, 3 U.S. (3 Dall.) 199 (1796). In the English system, treaties are entered into, and concluded, by the Crown without any intervention by Parliament. Consequently, treaties are ineffectual domestically without implementing legislation from Parliament.

Dissatisfaction with that system, and the anarchical consequence that binding treaties were often practically unenforceable, led our Founding Fathers to abandon the English system in favor of our Constitution's system of treaty negotiation by the Executive and ratification by the Senate. By its unambiguous text the Supremacy Clause declares treaties to be "the supreme Law of the Land", and thus automatically incorporates these international agreements into the domestic law of the United States, without the need for further action once the treaty is ratified by the Senate. The effect is to render treaty provisions enforceable in the courts at the behest of affected individuals, in applicable cases. See United States v. Alvarez Machain, 504 U.S. 655, 667 (1992) ("The Extradition Treaty has the force of law, and if . . . it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation"); United States v. Puentes, 50 F.3d 1567, 1575 (11th Cir. 1995) (same). Contra Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) ("Treaties in the United States do not generally create rights that are privately enforceable in courts").

In one of the first cases to consider the applicability of the British rule under our constitutional system, the Supreme Court stated that:

> In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.

Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); cf. United States v. Perchman, 32 U.S. (7 Pet.) 51 (1833); see also Edye v. Robertson("Head Money Cases"), 112 U.S. 580, 598-99 (1884) ("A

treaty, then is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.")

Unfortunately, we are no longer in the same playing field that existed when the Court decided Foster and Parchman, whose holding has since been distorted beyond recognition with the tail end of the quoted language often wagging the principal rule established by those cases. Cf. Goldstar (Panama), S.A. v. United States, 67 F.2d 965, 968 (4th Cir. 1992); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir.1985); Cardenas v. Smith, 733 F.2d 909, 918 (D.C. Cir. 1984); Tel-Oren v. Libyan Arab Republic, supra; British Caledonian Airways v. Bond, 665 F.2d 1153, 1160 (D.C. Cir. 1981); United States v. Postal, 589 F.2d 862, 874 (5th Cir. 1979).[3] The bottom line to these cases seems to be that we should look to the "intent" of the treaty to determine whether it is self-executing, or more in point, whether it creates rights that individuals can enforce in the courts. As the majority purports to recognize, however, we begin this inquiry with the terms of the treaty. See Alvarez-Machain, 504 U.S. at 366 (courts look first to a treaty's terms to determine its contents); Stuart, 489 U.S. at 365-66 ("the clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories'"). If we look to this guideline as the starting point to our inquest in the present appeal, I fail to see why further analysis is required or is appropriate.

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[3] There are, of course, many treaties entered into by the United States regarding which even after Senate ratification, and thus "incorporation" as municipal law, the subject matter is such that individuals lack standing to base claims or defenses in a court of law. See Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988). But such is not the present case.

III. The Text of Articles 36 and 35 of the Vienna Convention and Bilateral Treaty

Contrary to the majority's characterization, the language of the Vienna Convention and the Bilateral Convention is anything but ambiguous. Section 36(1)(b) unequivocally states that:

> The . . . authorities shall inform the person [detained] . . . without delay of his rights [to consular notification and assistance].

(Emphasis supplied). This language, particularly that which I have emphasized, (1) mandates ("shall") action, (2) without delay, (3) by the detaining "authorities," which action is, (4) to "inform" the detained "person", (5) "of his," (6) "rights" to seek assistance from his consular representatives. This provision does not entail arcane or obscure parlance, or require the application of complex notions or of concepts that are difficult to understand or decipher. It simply requires a detaining authority in the United States, as soon as a foreign national is detained, to inform him or her of their right to request consular assistance with regards to the detention.

Were we dealing with such text in a statute originally enacted by Congress rather than this species of "Law of the Land," is there any doubt as to how this provision would be interpreted?

We might very well quarrel, for example, as to how much time could pass after detainment before the failure to notify the alien of his/her rights was unreasonable, or there might be an issue as to whether there was a "detention" such as triggered the notification obligations imposed upon the authorities, or such other scenarios as are commonly litigated under similar doctrines, such as Miranda v. Arizona, 384 U.S. 436 (1966). But it is almost beyond cavil, were we faced with facts such as are presented by this appealed, with a statute reading as does Article 36, that the outcome would be preordained. The authorities would be found to have violated appellants' rights in failing to inform them of their right to consular assistance while detained for approximately 50 days and shipped from one side of the globe to the other and back again.

In fact I have some difficulty envisioning how it is possible to frame language that more unequivocally establishes that the protections of Article 36(1)(b) belong to the individual national, and that the failure to promptly notify him/her of these rights constitutes a violation of these entitlements by the detaining authority. I must also confess to no small amount of bafflement, not to say disappointment, with the reluctance demonstrated by my colleagues in the majority, as well as other courts, in refusing to provide a forum for the vindication of what amounts to a confessed and flagrant violation of our national law by the Government. I would ask, what arena is more appropriate than the courts of the United States, for an individual to seek the validation of his/her rights against Governmental transgression of its own laws and regulations? *See Fort Stewart Schs.* v. *FLRA*, 495 U.S. 641, 654 (1990) (citing *Vitarelli* v. *Seaton*, 359 U.S. 535, 547 (1959), and *Service* v. *Dulles*, 354 U.S. 363, 388 (1957)). "Indeed, given that a treaty should generally be 'construed] . . . liberally to give effect to the purpose which animates it' and that '[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred,'" *Stuart*, 489 U.S. at 368, I am at a loss to find rhyme or reason in the majority's conclusions.

The majority makes much of the preamble to the Vienna Convention, which states, *inter alia*:

> The State Parties to the present Convention,
>
> . . . .
>
> Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, . . .
>
> Realizing that *the purpose of such privileges and immunities is not to benefit individuals* but to ensure the efficient performance of the functions of diplomatic missions as representing states,
>
> . . . .
>
> Have agreed as follows.

23 U.S.T. at 3230 (emphasis supplied). The majority argues that the underscored language specifically excludes the claim of individual rights made by appellants. I find this a specious contention.

It is clear that in the context in which this provision is framed (e.g., "such privileges and immunities"), it refers to the privileges and immunities of "diplomatic agents" *qua* diplomatic agents, and not with respect to the individual rights established in Article 36(1)(b) for the benefit of detained nationals. See United States v. Rodrigues, 68 F. Supp. 2d 178, 182 (E.D.N.Y. 1999); see also Mark Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul, 18 Mich. J. Int'l L. 565, 594 (1997).

I would add that reliance on this language to attempt to defeat appellants' claim of individual rights has an additional downside for those espousing this dubious position. If the inclusion of this language in the preamble to the Vienna Convention has the significance attributed to it, then the exclusion of this same wording from the preamble or text of the Bilateral Treaty with China, a specific accord on a similar subject which postdates the multinational Vienna Convention by thirteen years, should lead to the opposite conclusion, that is, it should mean that individuals do have such rights under the Bilateral Treaty. However such mental gymnastics are unnecessary, because the Bilateral Treaty's language is even more precise than that of the Vienna Convention in establishing individual rights.

Not only does the preamble of the Bilateral Treaty explicitly state as one of the goals of this treaty, "the protection of the rights and interests of their nationals . . .," (emphasis supplied), stated as a separate item from the goal of protecting the interests of the contracting nations, but Article 35(3) of this treaty precisely requires that:

> The competent authorities of the receiving State shall immediately inform the national of

> the sending State of the *rights accorded to him* by this Article to communicate with a consular officer.

(Emphasis supplied). This explicit detailing of the obligation and concurrent right should require us to proceed no further in our recognition of appellants' claims. However, the majority's reliance on so-called "nontextual sources" and "legislative history" as support for its conclusions, forces us to reluctantly delve into that morass, notwithstanding the good advice that caution us to the contrary when statutory language is unambiguous. *See* *Immigration & Naturalization Service* v. *Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J. concurring) ("[I]f the language of a statute is clear, that language must be given effect . . . at least in the absence of a patent absurdity."). In any event, the "nontextual sources" and "legislative history" cited by the majority in actuality fully support appellants' contentions.

IV. The Background to Article 36 of the Vienna Convention

Of all the provisions of the Vienna Convention, the one with the "most tortured and checkered background is indubitably Article 36." *See* Luke Lee, *Vienna Convention on Consular Relations* 107 (1996). This provision was the subject of extensive and divisive debate before it was finally approved, with the differences centering mostly on the question of the foreign national's autonomy and rights under the proposed Article 36. *Id.* at 107-14; *see also* 1 United Nations Conference on Consular Relations: Official Records, at 3, U.N. Doc. A/Conf. 25/6, U.N. Sales. No.63.X.2 (1963) (hereinafter "U.N. Official Records").

The positions of the delegates from the United Kingdom and Australia were typical of the prevailing view. The former expressed his rejection of a proposal that a consul be notified only if the detained national so requested, because "[i]t could well make the provisions of Article 36 ineffective because the person arrested might not be aware of *his rights*." *Id.* at 83-84 (emphasis supplied); *see also id.* at 339, 344. The Australian delegate stated along a similar vein, that "[t]here was no need to stress the extreme importance of not disregarding, in the present or any other international document, the *rights of the individual*." *Id.* at 331 (emphasis supplied). In fact the United States delegate proposed an amendment to Article 36(1)(b) that the notification to a consul of a national's detention be made at the request of the national, "to protect the *rights of the national concerned*." *Id.* at 337 (emphasis supplied). From these and other statements by the various national delegates there should be little doubt that the treaty under consideration concerned not only consular rights but also the separate individual rights of detained nationals. *Id.* at 37 (statement of Soviet delegate); *id.* at 37, 82, 85, 339, 345 (statements of Tunisian delegate); *id.* at 38 (statement of Congolese delegate); *id.* at 339 (statement of Greek delegate); *id.* at 338 (statement of the Korean delegate); *id.* at 332, 344 (statement of Spanish delegate). *id.* at 81, 339, 340-01 (statement of the Indian delegate); *id.* at 82, 332 (statement of the French delegate); *id.* at 84 (statement of the Federal Republic of Germany); *id.* (statement of the delegate of Brazil); *id.* at 331 (statement of the delegate of Venezuela); id. at 332 (statement of the delegate of Kuwait); id. at 335 (statement of the Swiss delegate); id. at 336 (statement of the delegate of New Zealand); id. at 343 (statement of the delegate of Ecuador); see also Mark Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search For the Right to Counsel, 18 Mich. J. Int'l L. 565 (1997) (discussing the Vienna Convention's history in this respect); Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963 (hereinafter "U.S. Vienna Report").

During the course of the debate, the United Kingdom submitted the amendment to Article 36 that eventually became the final approved version of paragraph (b)(1), requiring the detaining nation to inform the detained foreign national of his/her right to consular access. The amendment was adopted 65 votes to 2, with 12 abstentions. The United States delegate voted in favor of the amendment. See U.S. Vienna Report at 60.

The Letter of Submittal of Secretary of State William P. Rodgers to the President dated April 18, 1969 is enlightening. In it Secretary Rodgers, in referring to Article 36(1)(b) indicates that:

> It requires that authorities of the receiving State inform the person detained of his right to have the fact of his detention reported to the consular post concerned and his right to communicate with that consular post. If he so requests, the consular post shall be notified without delay.

(Emphasis supplied).

The U.S. Vienna Report, which is attached to the Letter of Transmittal states the following:

> The solution adopted by the Conference to the problem of adjusting the notification obligations of the receiving State to the *right of the individual concerned* to request notification lies in the final sentence of subparagraph 1(b). That sentence *requires authorities of the receiving State to inform the person detained of his right* to have the fact of his detention reported to the consular post concerned and of *his right* to communicate with that consular post. This provision has the virtue of setting out a requirement which is *not beyond means of practical implementation in the United States*, and, at the same, is useful to the consular service of the United States in the protection of our citizens abroad.

(Emphasis supplied).

The Letter of Transmittal also includes the Report from the Committee on Foreign Relations reporting favorably on the Vienna Convention and recommending that the Senate give its advice and consent to the same. *See* Sen. Exec. Rep. 91-9, 91st Cong., 1st Sess. (1969). The Senate Report attaches the testimony of J. Edward Lyerly, the Deputy Legal Advisor for Administration before the Committee in which he states at the outset that "[t]he Convention is considered *entirely self-executive* and does not require any implementing or complementing legislation." (Emphasis supplied).

There is further evidence in actions taken by the State Department *ante litigiu*, supportive of appellants' claims.[4] Much can be found in the Department's booklet entitled "Consular Notification and Access," a document instructing federal, state, and local law enforcement personnel regarding foreign nationals in the United States and their rights to consular notification and access.[5] See Government's Supplemental Appendix on Rehearing En Banc, Vol. II. Under the rubric of "Summary of Requirements Pertaining to Foreign Nationals," the first directive states that: "1. When foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified." Id. at 467. Later in this document there are "Suggested Statements to Arrested or Detained Foreign Nationals." Id. at 469. For example: "In all cases, the foreign national must be told of the right of consular access." Id. (emphasis in the original). This statement is repeated in like form on the next page. Id. at 472; see also id. at 477, 483, 484. The booklet also restate's Mr. Layerly's averment before the Senate to the effect that "[i]mplementing legislation is not necessary (and the Vienna Convention and bilateral agreements are thus "self executing") because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers." Id. at 484 (emphasis supplied). Last but not least, the State Department

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[4] I find the majority's reliance on positions taken by the State Department during litigation to be unpersuasive, particularly as those positions are both self-serving and directly contrary to

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the Department's nonlitigation position, as I describe above.

[5] This booklet indicates that the instructions therein are based on legal obligations set forth in the Vienna Convention and bilateral treaties which "are binding on federal, state, and local government officials to the extent that are within such officials' competence", by virtue "Article VI, clause 2 of the Constitution of the United States." Id. at 471.

thoughtfully provides a model "Consular Notification and Access Card" with the suggested statement to be made to the detained foreign national notifying him of his rights.

Not surprisingly, and I would add reassuringly to those of us that occasionally find ourselves outside the confines of our national borders,[6] the State Department vis-a-vis U.S. citizens arrested or detained in foreign lands,[7] takes a position similar to appellants in this case. In its Foreign Affairs Manual, the State Department indicates that "Article 36 of the Vienna Consular Convention provides that the host government must notify the arrestee without delay of the arrestee's right to communicate with the American consul." Id. at 378 (emphasis added). That said, and at the risk of stating what is obvious, I believe that the Government's position regarding the restricted application of the Article 36 (of the Vienna Convention) and Article 35 (of the Bilateral Treaty) rights of foreign nationals in the United States not only establishes a repugnant double standard but, considering more practical applications, sets up our many citizens abroad for abuses that we will be hard-put to object to, considering the tenor and outcome of the present appeal. See Gregory Dean Grisvold, Strangers in a Strange Land: Assessing the Fate of Foreign

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[6] Millions of U.S. citizens travel abroad annually. In 1997 17,700,000 traveled to Mexico alone. The Time Almanac 2000, at 354. In that year 476,000 traveled to the People's Republic of China. Id. It is estimated that more than 3,000,000 U.S. citizens live abroad.

[7] Over 2500 U.S. citizens are arrested abroad annually. See U.S. State Department, Bureau of Consular Affairs, Office of Overseas Citizens Services.

Nationals Arrested in the United States by State and Local Authorities, 78 Minn. L. Rev. 771, 792-94 (1994) (hereinafter "Strangers in a Strange Land").

V. The Background to Article 35

The "legislative history" leading to the Bilateral Treaty with China is sparse. The Senate Report recommending its approval did state, however, that "[t]he bilateral consular convention will complement the multilateral Vienna Convention on Consular Relations of 1963 which is also in force between the two countries, but which treats certain important consular issues in only limited fashion." Sen. Exec. Rep. No. 97-14, 97th Cong., 1st Sess. (1981), at 2. Furthermore, I am astounded by the majority's contention that the Committee's failure to specifically note the individual right of consular notification somehow negates the clear language of Article 35.[8] As alluded to above, Article 35 of the Bilateral Treaty is even more emphatic and explicit than Article 36 of the Vienna Convention regarding the individual right of the national to notification of this entitlement by the detaining authority.

VI. The Interpretations of the Enforcement Authorities

Lastly we come upon the views of the enforcing authorities, that is, the ones that on a day to day basis are in the business of detaining and arresting persons, some of which are foreign nationals, and thus are charged with the practical implementation of Article 36 and Article 35. In this respect I should restate my view that once the pertinent treaty is ratified and thus incorporated into municipal law, the State Department should no longer be considered an "enforcing authority." The principal federal governmental entities fitting this description are the Department of Justice and the Immigration and Naturalization Service,[9] precisely the two "authorities" directly involved in appellants' detention and arrest. Both have explicit regulations respecting the issue before us, see 28 C.F.R. § 50.5; 8 C.F.R. § 236.1, both of which regulations were ignored with apparent impunity, and now, with judicial blessing, will continue to be transgressed per saecula saeculorum.

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[8] The committee report devotes barely half a page to its "Section-by-Section Analysis" of the entire Bilateral Treaty--hardly a comprehensive enumeration of the treaty's provisions.

The INS regulation specifically requires that "[e]very detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." 8 C.F.R. § 236.1(e) (emphasis supplied). The Department of Justice's regulation also requires that "[i]n every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given."[10] 28 C.F.R. § 50.5(1) (emphasis supplied). Notwithstanding these regulations and their conceded violation by the detaining authorities, it appears that the majority is willing to carve out an exception, where aliens are concerned, to the well-established rule which demands of the Government compliance with its own regulations. See, e.g., Fort Stewart Schs. v. FLRA, 495 U.S. 641, 654 (1990) (citing Vitarelli v. Seaton, 359 U.S. 535, 547 (1959), and Service v. Dulles, 354 U.S. 363, 388 (1957)).

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[9] Although INS is structured within the Department of Justice, it has its own regulation regarding the arrests of aliens. 28 C.F.R. § 50.5(b).

[10] Some treaties require notification to the consul irrespective of the individual's wishes.

VII. The Issue of Remedy

Finally, although my principal disagreement with the majority is over the Vienna Convention and the Bilateral Treaty's creation of individual rights, I must also take issue with their treatment of the question of remedy.[11] The majority holds that even if appellants have rights under Articles 36 and 35, they are not entitled to suppression of the wrongfully obtained evidence (or dismissal of the indictment) when the government violates those rights.[12] I would first say that whenever a court of the United States takes such a position, there is an inevitable erosion of the Judiciary as an institution. It is difficult to harmonize the principle of the rule of law with the granting of governmental immunity from the consequences of its violations of the Law.

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[11] I would emphasize that the ordinary course of proceedings is for the trial court to make a determination of remedy in the first instance. I think that the majority's side-stepping of the ordinary process in this case to avoid the treaties' clear statement of individual rights is ill-advised, and I would remand the case to the district court to address the issue of remedy if prejudice is first found. However, because the majority hangs its hat on the remedy issue, I will address it briefly.

[12] Although I interpret the majority opinion to reach only the narrow question of whether these two remedies--suppression and dismissal--are available, particularly in view of the position taken by the concurrence I cannot agree with the majority's conclusion.

The majority's "no remedy" rationale is based entirely on the conclusory assertion that "Article 36 of the Vienna Convention, and the complementary Article 35 of the Bilateral Convention, do not create--explicitly or otherwise--fundamental rights on par with the rights to be free from unreasonable searches, the privileges against self-incrimination, or the right to counsel." I disagree with that conclusion, and I believe that the issue at least deserves a more thorough examination than the cursory treatment afforded it by the majority.

As the majority notes, the exclusionary rule has been reserved for violations of fundamental rights such as those protected by the Fourth, Fifth, and Sixth Amendments. What the majority does not discuss, however, is what makes these rights "fundamental." In my view, we consider these rights fundamental not merely because they appear (along with others) in the Constitution, but because they are essential to the fair and efficient administration of our justice system.

Underlying the Sixth Amendment right to counsel, for instance, is the recognition that the ordinary criminal defendant is unqualified and ill-prepared to navigate the intricacies of our legal system without assistance. As the Supreme Court stated eloquently in Powell v. Alabama, 287 U.S. 45, 68-69 (1932):

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether

> the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Quoted in Gideon v. Wainwright, 372 U.S. 335, 345 (1963). The Court has also recognized a right to counsel at the investigatory stage of criminal proceedings, based on the Fifth Amendment's protection against compelled self-incrimination. See Miranda v. Arizona, 384 U.S. 436, 470 (1966) (noting that presence of counsel at interrogations can "mitigate dangers of untrustworthiness" and "help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial").

In my view, the right to consular notification and access responds to the same basic concerns for fairness and efficient administration of justice as does the right to counsel. The appellants in this case, for example, were detained by the United States half a world away from their homes. They spoke no English. They had no relatives or friends in the United States or any of the places where they were detained by U.S. authorities before being brought here. None had ever been to the United States before, and we must assume that none had any understanding of the American legal system. They very likely did not know that they had a right not to incriminate themselves and a right to be represented by counsel, nor even that they had a right to trial by jury.[13] In these unfamiliar circumstances, appellants were detained for nearly fifty days without counsel while they were shipped literally around the world, from Bermuda in the Atlantic, to Guantánamo in the Caribbean, to Wake Island and Hawaii in the Pacific, and finally to Boston.

It seems to me, under these circumstances, that consular notification and access are absolutely essential to the fair administration of our criminal justice system. Just as a lawyer guides a criminal defendant through the unknown territory of the justice system, diplomatic officials are often the only familiar face for detained nationals, and the best stewards to help them through the ordeal of criminal prosecution. A consular official offers two things of utmost importance to detained nationals: (1) the familiar background, language, and culture of the alien's homeland, and (2) a familiarity with the criminal system threatening to take away the alien's liberty. Without these aids, I think that we presume too much to think that an alien can present his defense with even a minimum of effectiveness. The result is injury not only to the individual alien, but also to the equity and efficacy of our criminal justice system.

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[13] This lack of familiarity is exacerbated when the detained aliens, like appellants, come from countries with vastly different legal and political systems, some of which have little or no recognition of the individual rights that we deem fundamental. See Strangers in a Strange Land, supra.

Because I think the rights to consular notification and access incorporated into domestic law by the Senate's ratification of the Vienna Convention and the Bilateral Convention are fundamental to the fair and efficient administration of our justice system, I would hold that the exclusionary rule may be an appropriate remedy, at least where the defendant alien can demonstrate prejudice from the violation of his treaty rights.[14]

VIII. Conclusion

In summary: (1) The Vienna Convention and the Bilateral Treaty are self-executing treaties which clearly grant detained individuals rights that are enforceable by them in the courts of the United States; (2) Both the text and "legislative histories" of these treaties, as well as subsequent action of the U.S. authorities support these conclusions; (3) Appellants have established that the authorities violated their rights under Articles 36 of the Vienna Convention and Article 35 of the Bilateral Treaty by failing to notify them of their right to consular assistance; (4) And the exclusionary rule may be an appropriate remedy for violations of these rights.

The contrary decision of this Court is unfortunate not only because it is legally unsupportable, but also because it will harm the credibility of our Nation internationally. Furthermore, it is short-sighted because it will undoubtedly adversely affect the rights of our citizens abroad.

For the reasons stated, I dissent.

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[14] I would be more hesitant to sanction the much harsher remedy of dismissal, although I would not rule out such a remedy in extreme cases, such as willful or deceptive denial of consular access.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jose LOMBERA-CAMORLINGA, Defendant-Appellant.

No. 98-50347.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted En Banc Dec. 16, 1999.

Filed March 6, 2000.

Benjamin L. Coleman, Assistant Federal Public Defender, San Diego, California, for the defendant-appellant.

David S. Kris, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

William J. Aceves, California Western School of Law, San Diego, California, for the amicus.

Appeal from the United States District Court for the Southern District of California; Rudi M. Brewster, District Judge, Presiding. D.C. No. CR-97-03423-RMB.

Before: HUG, Chief Judge, BROWNING, SCHROEDER, BOOCHEVER, KOZINSKI, O'SCANNLAIN, KLEINFELD, THOMAS, McKEOWN, WARDLAW, and W. FLETCHER, Circuit Judges.

Opinion by Judge SCHROEDER; Dissent by Judge BOOCHEVER; Dissent by Judge THOMAS.

SCHROEDER, Circuit Judge:

*1 Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, provides that law enforcement officials "shall inform" arrested foreign nationals of their right to notification of their consulates. A panel of this court held that Article 36 creates an individual right that is enforceable in the courts of the United States. United States v. Lombera- Camorlinga, 170 F.3d 1241, 1242-43 (9th Cir.1999) (withdrawn). Reversing the ruling of the district court, the panel further held that a defendant's post- arrest statements made before being advised of this right are inadmissible in a subsequent criminal prosecution, provided the defendant can show prejudice from the lack of notification. Id. at 1243-44.

We voted to accept en banc review of the case to consider whether the suppression of evidence is an appropriate remedy for violation of the Vienna Convention. We now hold that it is not, for there is nothing in the language or operation of the treaty provision to suggest Article 36 was intended to create an exclusionary rule with protections similar to those announced by the United States Supreme Court three years later in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In reaching this decision, we give some weight to the State Department's interpretation of the treaty, set forth in a letter originally submitted in conjunction with similar litigation currently pending in the First Circuit, United States v. Nai Fook Li, Nos. 97-2034, et al. We do not decide whether the treaty creates individual rights that are judicially enforceable in other ways.

The underlying facts are not in dispute. Jose Lombera-Camorlinga, a citizen of Mexico, was arrested at the Calexico, California port of entry when 39.3 kilograms of marijuana were found in his vehicle. Before questioning Lombera- Camorlinga, officers advised him of his Miranda rights but did not inform him of any rights under the Vienna Convention, nor did they contact the Mexican consular post. Lombera-Camorlinga subsequently made self-incriminating statements.

After his indictment on charges of importation of marijuana and possession of marijuana with intent to distribute, Lombera-Camorlinga moved for suppression of his post-arrest statements on the ground that they were obtained in violation of Article 36 of the Vienna Convention. The district court denied the motion, and Lombera-Camorlinga entered a conditional guilty plea and appealed his subsequent conviction. On appeal, a panel of this court held that the district court erred in denying the motion to suppress without first making a determination of prejudice. Lombera-Camorlinga, 170 F.3d at 1244. In so doing, the panel held that (1) the Vienna Convention creates judicially enforceable individual rights, and (2) suppression may serve as a remedy for the violation of these rights if the foreign national can demonstrate prejudice. Id. at 1242-44. A majority of the active, nonrecused judges of this court voted to rehear the case en banc. Our en banc review was aided by the excellent quality of oral argument on behalf of both the appellee and appellant.

The Vienna Convention is a 79-article, multilateral treaty to which both the United States and Mexico are signatories. It was negotiated in 1963 and ratified by the United States in 1969, thereby becoming the supreme law of the land. See U.S. Const. art. VI, cl. 2. Its provisions cover a number of issues that require consular intervention or notification, including the death of a foreign national, the necessity of appointing a guardian or a trustee for a foreign national who is also a minor, the crash of a foreign airplane or the wreck of a foreign boat, and the arrest or detention of a consular officer. Article 36 deals with what a member state must do when a foreign national is arrested. It provides, in relevant part:

> *2 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> ....
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

The panel held that in addition to creating obligations between nations, Article 36 creates individual rights enforceable in the courts of the United States. The panel looked primarily to the plain language of the provision, which states that the foreign national is to be informed of "his rights" under that section. Also lending some support to this view is the fact that the contact with the foreign consulate is required only if the foreign national requests it. Domestic law enforcement authorities thus have no obligation to the foreign consulate unless the foreign national himself triggers one. This implies that the provision exists for the protection of the foreign national.

The Supreme Court has treated the issue of whether the provision creates any judicially enforceable rights as an open question, stating in Breard v. Greene, 523 U.S. 371, 118 S.Ct. 1352, 1355, 140 L.Ed.2d 529 (1998), that the Vienna Convention "arguably" creates individual rights. Our own court has on at least two occasions, in a different but related context, recognized a judicially enforceable right to request consular notification in deportation proceedings. See United States v. Rangel-Gonzalez, 617 F.2d 529 (9th Cir.1980); United States v. Calderon-Medina, 591 F.2d 529 (9th Cir.1979). In those cases, however, the Department of Justice had embodied the Vienna Convention provisions in a corresponding INS regulation, 8 C.F.R. § 242.2(e), and we relied on that regulation in reaching our decisions. See Rangel-Gonzalez, 617 F.2d at 530; Calderon-Medina, 591 F.2d at 531. We had no occasion to hold that the violation of the treaty alone was sufficient to permit a foreign national to overturn a deportation.

On a general level, the Supreme Court has recognized that treaties can in some circumstances create individually enforceable rights. See United States v. Alvarez-Machain, 504 U.S. 655, 659-60, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992). The leading example is United States v. Rauscher, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886), holding that through the provisions of an extradition treaty, the requirement of specialty-permitting prosecution only for the crime on which extradition was based-could serve as a defense to an attempted prosecution for another crime. See id. at 420. The Court's reasoning in Rauscher relied on the specific provisions of the particular extradition treaty invoked as a defense. See id. at 418-19. Alvarez-Machain the Court considered the extradition treaty between the United States and Mexico, which establishes an orderly process for transferring individuals from one country to the other for criminal prosecution. The Court held that because the treaty failed to expressly prohibit U.S. law enforcement from circumventing this process and abducting Mexican citizens in order to force them to stand trial in the United States, such conduct could not serve as a defense to jurisdiction. 504 U.S. at 664-70. Whether or not treaty violations can provide the basis for particular claims or defenses thus appears to depend upon the particular treaty and claim involved.

*3 The government argues strenuously that Article 36 creates no judicially enforceable individual rights of any kind, calling our attention to the Vienna Convention's preamble language, which states that the "purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts...." Appellant rejoins that in Calderon-Medina we declined to endorse the same argument, pointing out that the "protection of some interests of aliens as a class is a corollary to consular efficiency." 591 F.2d at 531 n. 6. The preamble is therefore not particularly helpful to our analysis.

We need not decide whether to accept the government's argument that Article 36 creates no individually enforceable rights, however. We agree with the government's alternative position that assuming that some judicial remedies are available for the violation of Article 36, the exclusion in a criminal prosecution of evidence obtained as the result of post-arrest interrogation is not among them.

In arguing that the statements should be suppressed, appellants urge us to make the unwarranted assumption that the treaty was intended to serve the same purposes as Miranda in enforcing the rights to counsel and against self- incrimination in the post-arrest context. Yet, the treaty does not link the required consular notification in any way to the commencement of police interrogation. Nor does the treaty, as Miranda does, require law enforcement officials to cease interrogation once the arrestee invokes his right. See Miranda, 384 U.S. at 444-45. Furthermore, while the rights to counsel and against self-incrimination are secured under the Fifth and Sixth Amendments to our own Constitution and are essential to our criminal justice system, they are by no means universally recognized or enforced. See Miranda, 384 U.S. at 442-43 (stating that the Fifth Amendment's right against self-incrimination "had its origin in a protest against the inquisitorial ... methods of interrogating accused persons, which have long obtained in the continental system") (quoting Brown v. Walker, 161 U.S. 591, 596-97, 16 S.Ct. 644, 40 L.Ed. 819 (1896)). See also Gordon Van Kessel, European Perspectives on the Accused as a Source of Testimonial Evidence, 100 W. Va. L.Rev. 799, 810 (1998) (explaining that even today European countries typically afford no right to counsel during police questioning); Diane Marie Amann, A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context, 45 UCLA L.Rev. 1201, 1251-54 (1998) (reporting the recent development of a right to silence in other countries but noting that the right generally remains less expansive than the Fifth Amendment right in the United States). There is no reason to think the drafters of the Vienna Convention had these uniquely American rights in mind, especially given the fact that even the United States Supreme Court did not require Fifth and Sixth Amendment post- arrest warnings until it decided Miranda in 1966, three years after the treaty was drafted. Judge Thomas's dissent discusses the longer history of the exclusionary rule for an involuntary confession, but that is not the issue we must decide.

Although appellant contends that the exclusionary rule is the usual and, in this instance, only effective way to enforce the treaty's requirement, this and other circuits have held in recent years that an exclusionary rule is typically available only for constitutional violations, not for statutory or treaty violations. See United States v. Smith, 196 F.3d 1034, 1040 (9th Cir.1999) ("The use of the exclusionary rule is an exceptional remedy typically reserved for violations of constitutional rights."). See also United States v. Hensel, 699 F.2d 18, 29 (1st Cir.1983) (rejecting suppression as a remedy for a treaty violation because the exclusionary rule "was not fashioned to vindicate a broad, general right to be free of agency action not 'authorized' by law, but rather to protect certain specific, constitutionally protected rights of individuals."); United States v. Ware, 161 F.3d 414, 424 (6th Cir.1998) (holding a statutory violation insufficient to justify imposition of the exclusionary rule, absent an underlying constitutional violation or right); United States v. Mason, 52 F.3d 1286, 1289 n. 5 (4th Cir.1995) (same); United States v. Thompson, 936 F.2d 1249, 1251 (11th Cir.1991) (holding a statutory violation insufficient to justify imposition of the exclusionary rule, absent an underlying constitutional violation or right or evidence that Congress intended exclusion as a remedy); United States v. Benevento, 836 F.2d 60, 69 (2d Cir.1987) (same); United States v. Kington, 801 F.2d 733, 737 (5th Cir.1986) (same).

*4 We do not limit the exclusionary rule to use as a remedy for constitutional violations alone. The Supreme Court some time ago indicated that an exclusionary remedy may be available for violations of provisions of law other than the Constitution. United States v. Blue, 384 U.S. 251, 255, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966). Our court has occasionally permitted evidence to be excluded as a remedy in cases involving certain statutory violations. See United States v. Doe, 170 F.3d 1162, 1168 (9th Cir.1999) (violation of the Juvenile Delinquency Act's parental notification provision); United States v. Van Poyck, 77 F.3d 285, 288 (9th Cir.1996) (violation of Fed.R.Crim.P. 5); United States v. Negrete- Gonzales, 966 F.2d 1277, 1283 (9th Cir.1992) (violation of Fed.R.Crim.P. 41); United States v. Soto-Soto, 598 F.2d 545, 550 (9th Cir.1979) (violation of 19 U.S.C. § 482). None of these cases shed much light on the propriety of using exclusion to remedy treaty violations, however, and the infrequency with which we have allowed an exclusionary remedy for a non-constitutional harm belies appellant's claim that exclusion is the normal or default rule in such circumstances.

Lacking any direct guidance from the Supreme Court or this court regarding the appropriateness of an exclusionary remedy for a violation of the Vienna Convention, appellant asks us to look by analogy to Rangel-Gonzalez and Calderon-Medina, which concerned an INS regulation requiring consular notification during the deportation process. Although the regulation was promulgated to ensure compliance with the Vienna Convention, Rangel-Gonzalez and Calderon-Medina did not consider the treaty directly. The cases held that an alien who can show prejudice stemming from the INS's failure to follow its own regulation requiring notification cannot later be prosecuted for illegal reentry because the defendant was never legally deported under U.S. law in the first place. See Rangel-Gonzalez, 617 F.2d at 530; Calderon- Medina, 591 F.2d at 53. Rangel-Gonzalez and Calderon-Medina are therefore only tangentially relevant to the question of whether a violation of a treaty can be remedied by exclusion of evidence in a criminal prosecution.

*5 While the panel was provided with "scant authority" on this issue, 170 F.3d at 1244, the State Department has now spoken, and has expressed its opinion that suppression is an inappropriate remedy. In Factor v. Laubenheimer, 290 U.S. 276, 54 S.Ct. 191, 78 L.Ed. 315 (1933), the Supreme Court stated that in resolving doubts about interpretation, "the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight." Id. at 295. See also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S.Ct. 662, 671, 142 L.Ed.2d 576 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); Kolovrat v. Oregon, 366 U.S. 187, 194, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."). It is true that courts tend to give less weight to an executive branch position adopted in the course of litigation, as is the case here, than to an interpretation made in diplomatic relations with other countries. See Restatement (Third) of Foreign Relations § 326 reporters' note 2. Given that the Vienna Convention is silent- and therefore ambiguous, at best-on whether or not suppression is an appropriate remedy, however, the State Department's opinion that it is not deserves at least some deference.

Equally important, the State Department's position is well-supported. The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary. The addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches. Moreover, the fact that the State Department is willing to and in fact does work directly with law enforcement to ensure compliance detracts in this instance from the traditional justification for the exclusionary rule: that it is the only available method of controlling police misconduct. See Arizona v. Evans, 514 U.S. 1, 10-11, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995) ("The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations ... through the rule's general deterrent effect. As with any remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served.") (citations omitted).

*6 The State Department also points out that no other signatories to the Vienna Convention have permitted suppression under similar circumstances, and that two (Italy and Australia) have specifically rejected it. In the Australian decision, R v. Abbrederis, (1981) 36 A.L.R. 109, the court concluded as we do today that the Vienna Convention's Article 36 protections neither target police interrogation nor seek to prevent self-incrimination or preserve the right to counsel. The opinion stated: "Even giving the fullest weight to the prescriptions in Art 36, I do not see how it can be contended that they in any way affect the carrying out of an investigation by interrogation." By refusing to adopt an exclusionary rule, we thus promote harmony in the interpretation of an international agreement. See Restatement (Third) of Foreign Relations § 325 cmt. d ("Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems.").

CONCLUSION

The language of the Vienna Convention and its operation over the last 30 years support the government's position that a foreign national's post-arrest statements should not be excluded solely because he made them before being told of his right to consular notification. We therefore affirm the judgment of the district court on the ground that it properly refused to exclude Lombera- Camorlinga's statements. We do not decide whether a violation of Article 36 may be redressable by more common judicial remedies such as damages or equitable relief.

AFFIRMED.

BOOCHEVER, Circuit Judge, with whom Judges JAMES R. BROWNING and THOMAS join, dissenting:

The majority opinion purports to avoid deciding whether Article 36 of the Vienna Convention creates individually enforceable rights to consular notification. "[A]ssuming that some judicial remedies are available for the violation of Article 36," Majority Opinion p. 2481, the majority nevertheless leaves as the only current form of enforcement the State Department's self- described practice of "investigating reports of violations and apologizing to foreign governments, and working with domestic law enforcement to prevent further violations when necessary." Majority Opinion p. 2485. This is equivalent to securing enforcement by a toothless, clawless lion. Defendants who actually have been prejudiced by the failure to be notified of their Article 36 rights may suffer imprisonment and other punishments to which they would not have been subjected had their rights been observed. Such an interpretation of the treaty hardly conforms to the due process principles embodied in the United States Constitution. We should not so interpret the treaty.

*7 The majority reasons that some other countries do not recognize or enforce the rights to counsel and against self-incrimination in the same manner as does our country. This is irrelevant, as the treaty does not specify an exclusive means for enforcing the provisions of Article 36. That two of the more than 161 signatory countries have concluded that the Vienna Convention's Article 36 protections "neither target police interrogation nor seek to prevent self-incrimination or preserve the right to counsel," Majority Opinion p. 2486, hardly dictates how the treaty provisions should be enforced in the United States. A foreign national arrested and prosecuted in the United States is entitled to the protections of our Constitution and the procedures of our criminal justice system. A foreign national whose right to counsel or against self-incrimination is violated in this country is entitled to suppression of evidence even if such a violation has no remedy in another country.

I agree with the majority's conclusion that "a foreign national's post arrest statements should not be excluded solely because he made them before being told of his right to consular notification." Majority Opinion p. 2486 (emphasis added). Unlike a Miranda violation, a violation of Article 36 does not automatically require suppression. But when the foreign national can show that he or she has been prejudiced by the failure to advise him or her of such a right, that prejudice should be rectified according to the protections accorded by our Constitution. District courts are perfectly capable of making the factual determination whether a foreign national was prejudiced. See, e.g., United States v. Miranda, 65 F.Supp.2d 1002, 1007 (D.Minn.1999); United States v. Alvarado-Torres, 45 F.Supp.2d 986, 991 (S.D.Cal.1999); United States v. Tapia-Mendoza, 41 F.Supp.2d 1250, 1254-55 (D.Utah 1999); United States v. Chaparo-Alcantara, 37 F.Supp.2d 1122, 1126-27 (C.D.Ill.1999) (all making factual finding that defendants did not establish prejudice from failure to inform them of right to contact consul).

Because I agree with Judge Pregerson's opinion in this case (now withdrawn), I repeat significant portions of its reasoning here. See United States v. Lombera-Camorlinga, 170 F.3d 1241, 1242 (9th Cir.1999) (withdrawn). [FN1]

*8 Article 36(1)(b) of the Vienna Convention on Consular Relations provides:

> [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 101 (emphasis added). As a treaty made under the authority of the United States, the Vienna Convention is the supreme law of the land. U.S. Const. art. VI, cl. 2.

It is undisputed that the customs officers who took Lombera-Camorlinga's statements did not inform him of the rights established by Article 36. Therefore, the customs officers violated the Vienna Convention.

While one of the purposes of Article 36 is to "facilitat[e] the exercise of consular functions lating to nationals of the sending State," Convention, Art. 36(1), foreign nationals are more than incidental beneficiaries of Article 36(1)(b). The treaty language itself clearly states that the rights enumerated in sub-paragraph 36(1)(b) belong to the foreign national: "The said authorities shall inform the person concerned without delay of his rights under this sub- paragraph." Convention, Art. 36(1)(b) (emphasis added). It strains the English language to interpret "his rights" in this context to refer to the Consulate's rights. We held in United States v. Rangel-Gonzales, 617 F.2d 529, 532 (9th Cir.1980), that "[t]he right established by the regulation and in this case by treaty is a personal one."

Moreover, the language of the provision is not precatory, but rather mandatory and unequivocal. See INS v. Cardoza-Fonseca, 480 U.S. 421, 441, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1986) (contrasting mandatory obligations and "precatory" provisions under the United Nations Protocol Relating to the Status of Refugees). Accordingly, individual foreign nationals have rights under Article 36(1)(b) of the Vienna Convention.

It has long been recognized that, where treaty provisions establish individual rights, these rights must be enforced by the courts of the United States at the behest of the individual. See United States v. Rauscher, 119 U.S. 407, 418- 19, 7 S.Ct. 234, 30 L.Ed. 425 (1886) (citing Head Money Cases, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884)); see also United States v. Alvarez- Machain, 504 U.S. 655, 659-60, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992) (recognizing the continuing authority of Rauscher). Because Article 36(1)(b) establishes individual rights, these rights must be enforced by our courts.

In determining an appropriate remedy for an Article 36 violation, we should look first to the language of the Article. See Alvarez-Machain, 504 U.S. at 663 ("In construing a treaty ... we first look to its terms to determine its meaning."). The majority goes beyond the treaty language to rely heavily on a letter from the State Department filed in conjunction with litigation in the First Circuit. As the majority acknowledges, however, that letter is entitled to little deference, as it was prepared in the course of litigation. We should defer even less to the post-hoc rationalization of an agency charged with enforcement of a treaty provision when its enforcement has been so notably lax.

*9 Article 36(2) provides: "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Convention, Art. 36(2).

Despite the importance of the Vienna Convention, and its status as the supreme law of the land, law enforcement officials continue to overlook the rights Article 36(1)(b) establishes for foreign nationals who are "arrested, in prison, custody or detention." Convention, Art. 36(1)(b). By failing to complain of these violations at trial, however, most individual defendants have "failed to exercise [their] rights under the Vienna Convention in conformity with the laws of the United States." Breard v. Greene, 523 U.S. 371, 118 S.Ct. 1352, 1355, 140 L.Ed.2d 529 (1998). As a result, violations of the Convention have often gone judicially unredressed. See, e.g., id.; Villafuerte v. Stewart, 142 F.3d 1124, 1125 (9th Cir.1998); LaGrand v. Stewart, 133 F.3d 1253, 1261 (9th Cir.), cert. denied, — U.S. —, 119 S.Ct. 422, 142 L.Ed.2d 343 (1998) (all holding that the Convention claim was procedurally defaulted).

By raising his claim in a pretrial suppression motion, the appellant exercised his rights under the Convention in conformity with our laws. See Breard v. Pruett, 134 F.3d 615, 622 (4th Cir.1998) (Butzner, J., concurring) ("The provisions of the Convention should be implemented before trial when they can be appropriately addressed.")

There is scant authority for the remedy in criminal cases involving violation of Article 36 of the Convention. We have addressed this issue, however, in cases involving prosecution for illegal entry following deportation. In United States v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir.1979), an alien had not been advised of his right to consult consular officials in the underlying deportation under 8 C.F.R. § 242.2(e) (1978), which required the INS to inform the alien of his right to consult with consular authorities. We concluded that the alien's later prosecution for illegal entry following deportation would be precluded if "the violation prejudiced interests of the alien which were protected by the regulation." Id. As we explained in Calderon-Medina, § 242 was intended to ensure compliance with Article 36 of the Vienna Convention and to protect some interests of the alien, rather than of the consulate. Id. at 531 n. 6. Therefore, we remanded for the district court to consider whether these interests had been prejudiced.

In Rangel-Gonzales, 617 F.2d at 531, we applied the standards laid down in Calderon-Medina. We held that because the defendant carried his burden to show some likelihood that had the same regulation "been followed his defense and the conduct of the hearing would have been materially affected," the indictment for illegal entry should have been dismissed. Id. We concluded that the violation prejudiced the interests of the defendant as protected by the INS regulation and, by association, the Vienna Convention. As Judge Schroeder wrote:

> *10 The appellant showed he did not know of his right to contact the consular officials, that he would have done so had he known, and that such consultation may well have led not merely to appointment of counsel, but also to community assistance in creating a more favorable record to present to the immigration judge on the question of deportation.

Id. The government produced no evidence to rebut that showing. See id. at 533.

I see no reason why the same standard should not apply in this case. Upon a showing that the Vienna Convention was violated by a failure to inform the alien of his right to contact his consulate, the defendant in a criminal proceeding has the initial burden of producing evidence showing prejudice from the violation of the Convention. If the defendant meets that burden, it is up to the government to rebut the showing of prejudice.

The majority dismisses Calderon-Medina and Rangel-Gonzales because in those cases an INS regulation implemented Article 36's requirement of consular notification. But the fact that the INS (an agency most likely to have the initial obligation of consular notification) adopted a regulation which clearly regards Article 36 as conferring an individual right argues for, not against, a conclusion that Article 36 establishes an individual right. Further, in those two cases, in which the defendants showed prejudice, this court dismissed the indictments against them, thus according them a remedy even more drastic than the suppression of evidence.

In this case, Lombera-Camorlinga filed a motion to suppress his post-arrest statements because he was not first advised of his rights under the Vienna Convention. The district court denied the motion to suppress without making a determination of prejudice. We therefore should reverse and remand to the district court for a determination whether in making his post-arrest statements, Lombera-Camorlinga was prejudiced by the violation of the Vienna Convention.

THOMAS, Circuit Judge, with whom Judges JAMES R. BROWNING and BOOCHEVER join in full, and with whom Judge WARDLAW joins with respect to Section II, dissenting:

I respectfully dissent from the majority's conclusion that the exclusionary rule is not the appropriate method by which a private right to consular notification should be enforced in the United States. [FN1] I also respectfully disagree with the majority's holding that deference should be paid to an agency's litigating position.

I

*11 The Vienna Convention on Consular Relations ("Vienna Convention" or "Treaty") requires the United States law enforcement officers to inform arrested foreign nationals of their right to have their respective consulates notified of the arrest. See Vienna Convention on Consular Relations, Article 36(1), 21 U.S.T. 77. It further requires that this right be exercised in accordance with the laws of the arresting country. See id., Article 36(2). The majority begins with the assumption that, in the United States, the exclusionary rule is generally available only for constitutional violations. Therefore, the majority concludes, the exclusionary rule cannot be considered the normal method of enforcing private procedural rights, such as those that may be created by treaty.

The syllogism proceeds from a faulty premise. The exclusionary rule as applied to confessions is not uniquely American, nor was it given birth by our Constitution. Rather, it originated from English common law, formally enunciated in King v. Warickshall, 168 Eng. Rep. 234, 235 (K.B.1783): A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.

The Warickshall rule continued in United States common law. See, e.g., Ziang Sung Wan v. United States, 266 U.S. 1, 14-15, 45 S.Ct. 1, 69 L.Ed. 131 (1924); Harrold v. Territory of Oklahoma, 169 F. 47, 54 (8th Cir.1909); Bram v. United States, 168 U.S. 532, 542, 18 S.Ct. 183, 42 L.Ed. 568 (1897); Hopt v. Territory of Utah, 110 U.S. 574, 585, 4 S.Ct. 202, 28 L.Ed. 262 (1884). Indeed, the doctrine was so ingrained that, by 1813, it was observed in argument that "[i]f the prisoner has been once induced to confess, by a promise or threat, it is the common practice to reject a subsequent confession of the same, or like facts." United States v. Charles, 25 F. Cas. 409, 410 (C.C.D.C.1813).

The first suggestion that the rule excluding improperly obtained confessions had an additional constitutional basis came in Bram, 168 U.S. at 542. However, it was not until Brown v. Mississippi, 297 U.S. 278, 285-87, 56 S.Ct. 461, 80 L.Ed. 682 (1936), that the Court fully embraced the Constitution as its primary basis for excluding improperly obtained confessions. In short, the application of exclusionary rule to confessions has been firmly established in American jurisprudence from the beginning of the Republic, long before its Constitutional dimension was explored by the courts.

Thus, with respect to confessions, we cannot brush off the exclusionary rule as confined to constitutional violations; indeed, our entire judicial history belies it. The majority acknowledges this by referencing some of the numerous occasions the exclusionary rule has been applied in a statutory context, [FN2] but discounts those instances as farrago, with no import in discerning whether the exclusionary rule is our nation's usual judicial remedy for violations of procedural rights. That may well be true in other contexts; for example, the exclusion of evidence obtained from an illegal search distinctly arises from the Fourth Amendment. See, e.g., Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). However, it is not true as applied to the exclusion of improperly obtained confessions.

*12 The question then is whether it is appropriate to apply the exclusionary rule to confessions obtained in violation of the Vienna Convention. In construing a treaty, we look to its plain words. See United States v. Alvarez-Machain, 504 U.S. 655, 663, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992). The Treaty provides that if a prisoner "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Vienna Convention, Article 36(1). It further provides that "[t]he said authorities shall inform the person concerned without delay of his rights under this sub-paragraph." Id. All parties, including the United States, agree that this language requires United States law enforcement officials to inform an arrested foreign national of the right to have his or her national consul informed of the arrest. The Supremacy Clause makes treaties, such as the one at bar, "the supreme Law of the Land," binding "the Judges in every State." [FN3] U.S. Const., Art. VI, cl. 2; see also Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979) ("[A]ll federal rights, whether created by treaty, by statute, or by regulation, are 'secured' by the Supremacy Clause.").

How is the right to consular notification to be exercised? The Treaty is not silent on this: it provides that the right "shall be exercised in conformity with the laws and regulations of the receiving State." [FN4] Vienna Convention, Article 36(2). Under our common law, and Constitutional law, improperly obtained confessions are not admitted into evidence. Confessions obtained without informing the defendant of his right to an attorney are inadmissible. See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Although the majority places great significance on the fact that Miranda was decided after the ratification of the Treaty, Miranda 's concerns about custodial interrogation without counsel did not appear as an epiphany: the Supreme Court had long considered denial of counsel a factor in determining whether, under the totality of the circumstances, a confession was voluntary. See Spano v. New York, 360 U.S. 315, 323, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959); Harris v. South Carolina, 338 U.S. 68, 70-71, 69 S.Ct. 1354, 93 L.Ed. 1815 (1949); Haley v. Ohio, 332 U.S. 596, 600, 68 S.Ct. 302, 92 L.Ed. 224 (1948); Malinski v. New York, 324 U.S. 401, 405-06, 65 S.Ct. 781, 89 L.Ed. 1029 (1945).

It has also long been part of our law that the exclusionary rule applies to confessions obtained in violation of a defendant's right to be brought promptly before a judicial officer. See Mallory v. United States, 354 U.S. 449, 455, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); McNabb v. United States, 318 U.S. 332, 341, 63 S.Ct. 608, 87 L.Ed. 819 (1943). [FN5] The McNabb-Mallory rule is relevant here because its theoretical underpinnings are similar to those upon which Article 36 rests, in that a similar duty to act with dispatch is imposed by the Treaty for the purpose of safeguarding rights. [FN6]

*13 Thus, when rights such as the right to have a consulate notified without delay have been violated, our courts have long applied the exclusionary rule as the remedy of choice under our law. The procedural protections we have required before admitting confessions as evidence were established to ensure that confessions were voluntary and obtained without employing improper means. Voluntariness is of special concern in the case of detained foreigners, who may neither speak English nor understand legal proceedings. [FN7] The panel's requirement that the defendant show prejudice is also consistent with our common law rule that the totality of the circumstances be considered in determining whether a confession was voluntary. [FN8]

The majority quite properly does not opine as to what remedies are available for enforcement of the right to consular notification. However, if one peeks behind the curtain, other alternatives are not attractive, nor are they consistent with the Treaty. In fact, the only options readily apparent are private damage actions, or an acknowledgment that the Treaty created a private right without any remedy at all. The Treaty does not provide expressly for private damage actions. Rather, the plain words of the Treaty provide that the notification right "shall be exercised," not that failure to notify should be compensated. Thus, the Treaty would not seem to contemplate private damage actions, and it would not be sound judicial policy to conjure a legal theory that would expose individual officers to liability for breaches of international treaties. The decision on whether to attach individual liability for such violations should be left to Congress.

That the right to consular notification may be a right without a remedy is also inconsistent with the Treaty's command that the right "be exercised in conformity with the laws and regulations" of the arresting state. Our law of criminal procedure is not merely aspirational; when a procedural right has been established, it is enforced. Thus, alternative readings of what enforcement mechanism might exist under our laws simply do not make sense, either textually or in the context of how our criminal procedural laws are administered.

As a matter of judicial administration, it is also far better to resolve any question about the voluntariness of a confession before trial, rather than confront the question for the first time at the behest of a foreign government on the eve of an execution. See, e.g., Breard v. Greene, 523 U.S. 371, 118 S.Ct. 1352, 1355, 140 L.Ed.2d 529 (1998); Villafuerte v. Stewart, 142 F.3d 1124, 1125 (9th Cir.1998); LaGrand v. Stewart, 133 F.3d 1253, 1261 (9th Cir.), cert. denied, — U.S. —, 119 S.Ct. 422, 142 L.Ed.2d 343 (1998).

For these reasons, I conclude that if a private right to consular notification exists under the Vienna Convention, the exclusionary rule is the appropriate method for enforcing that right in the United States when a defendant can demonstrate actual prejudice from the treaty violation.

II

*14 I must respectfully also part company from the majority in its holding that we must defer to an agency's litigating position. The Supreme Court has rejected such deference. See, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). So have we. See, e.g., Resource Invs., Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162, 1165 (9th Cir.1998). There is a sound basis for this rule. As the Supreme Court has explained, "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." Investment Co. Inst. v. Camp, 401 U.S. 617, 628, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971). Administrative agency constructions of governing statutes, or in this case a treaty, performed outside the adversary system are properly worthy of deference. However, agency positions developed in response to a lawsuit are not of the same character: they are specifically tailored to help obtain a favorable outcome in a pending controversy in which the agency is involved. Although we must certainly consider the persuasive force of the agency's argument, it is just that. The arguments advanced by an agency in litigation ought to rise or fall on their own weight.

Deference in this case is especially inappropriate because it is given to the agency's litigation position in entirely separate litigation in another circuit. The reasoning of the Department of State has proved persuasive; we need not adopt a special rule deferring to its assertions as a matter of law. I respectfully suggest that we gravely err in creating such a rule.

III

A nation's commitment to the rule of law is measured by its willingness to subject its own government to it. The Vienna Convention requires the United States law enforcement officers to inform arrested foreign nationals of their right to have their respective consulates notified of the arrest. It further requires that this right be exercised in accordance with the laws of the arresting country. These obligations were not conjured by the judiciary: they were negotiated by the President and ratified by the United States Senate. Each year, the Department of State notifies law enforcement officials of their obligations under the Treaty.

Although we must be cautious not to intrude into the foreign policy of the United States, this treaty calls for enforcement in accordance with our laws. From the inception of our criminal justice system, we have refused to admit evidence of confessions obtained in violation of law. As Justice Frankfurter observed in McNabb, "[t]he history of liberty has largely been the history of observance of procedural protections." 318 U.S. at 347. Thus, the exclusionary rule is the proper means of enforcing these specific treaty obligations when the defendant has shown actual prejudice. Our commitment to the rule of law requires us to afford detained foreign nationals our usual procedural remedies, just as we expect foreign governments to respect the rights of our citizens when they travel abroad.

FN1. Although I have adopted substantial portions of that opinion verbatim, for ease in reading this dissent, direct quotation is not further indicated.

FN1. The majority does not reach the issue of whether a private right of enforcement exists under the treaty. Rather, it limits its discussion to the judicial remedies afforded by the Treaty. This analysis is similarly confined.

FN2. It is clear that, as a general matter, the

Supreme Court has not limited the use of the exclusionary rule to constitutional violations. See United States v. Blue, 384 U.S. 251, 255, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966) (noting that the Supreme Court "in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure."); see also Miller v. United States, 357 U.S. 301, 313-14, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958) (upholding suppression of evidence obtained in violation of 18 U.S.C. § 3109, the federal "knock and announce" statute); Mallory v. United States, 354 U.S. 449, 455, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957) (stating that suppression of statements obtained in violation of Fed.R.Crim.P. 5 would be proper if failure to arraign "without unnecessary delay" provided "an opportunity for the extraction of a confession"). Nor have we. See, e.g., United States v. Gantt, 194 F.3d 987, 994 (9th Cir.1999) (holding that technical violations of Fed.R.Crim.P. 41(d) require suppression if there was a "deliberate disregard of the rule" or "if the defendant was prejudiced"); United States v. Doe, 170 F.3d 1162, 1168 (9th Cir.1999) ("Although the § 5033 violation [of the Federal Juvenile Delinquency Act] is not a due process violation, it may serve as an independent basis for suppression.") (citing United States v. Doe, 155 F.3d 1070, 1073 (9th Cir.1998) (en banc)), cert. denied, — U.S. —, 120 S.Ct. 429, 145 L.Ed.2d 335 (1999); United States v. L.M.K., 149 F.3d 1033, 1035 (9th Cir.1998), as amended, 166 F.3d 1051 (9th Cir.1999) (stating that violation of § 5033 of Federal Juvenile Delinquency Act may, upon a showing of prejudice, justify limited remedies such as suppression, even though statutory violation does not deny due process), cert. denied, — U.S. —, 120 S.Ct. 106, 145 L.Ed.2d 89 (1999); United States v. Van Poyck, 77 F.3d 285, 288 (9th Cir.1996) (noting that incriminating statements obtained in violation of Fed.R.Crim.P. 5(a) and 18 U.S.C. § 3501(c) may be excluded by the court's discretion); United States v. Soto-Soto, 598 F.2d 545, 550 (9th Cir.1979) ("Statutory law was disregarded. Exclusion of the evidence seized is the only available effective deterrent of such disregard."); cf. United States v. Doe, 862 F.2d 776, 780-81 (9th Cir.1988) (holding that reversal of conviction is required if alien defendant was prejudiced by government's failure to contact his parents and Mexican Consulate as required by Federal Juvenile Delinquency Act); United States v. Gatto, 763 F.2d 1040, 1046 (9th Cir.1985) (suggesting that supervisory power to exclude evidence could be exercised where there is a violation of "any constitutional provision, federal statute, specific discovery order, or any other recognized right").

FN3. The Supremacy Clause reads in full: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2.

FN4. Thus, the fact that the exclusionary rule is not referenced in the Treaty is of no moment. The Treaty expressly contemplates that the enforcement mechanism be left to the laws of the arresting nation.

FN5. It is also noteworthy that the McNabb-Mallory rule was not constitutionally based: McNabb was founded on the Supreme Court's "exercise of its supervisory authority over the administration of criminal justice in the federal courts," 318 U.S. at 340, and Mallory was based on violations of procedural rules, see 354 U.S. at 451-52.

FN6. In its publication on the issue, the Department of State states that the requirement that the detained foreign national be informed of his right to contact his consulate "facilitate[s] the foreign government's ability to protect its nationals" including ensuring "they receive a fair and speedy trial with benefit of counsel." Department of State, Consular Notification and Access 42-43 (1998).

FN7. Indeed, that was the essence of Paraguay's claim against the United States in the International Court of Justice regarding the case of Angel Breard. Paraguay contended that Breard had language difficulty and that his confession "was based on a misunderstanding of the United States justice system" and that if the United States had complied with its duty of consular notification the "result would have been different." In the Case Concerning the Application of the Vienna Convention on Consular Relations (Paraguay v. United States), 1998 I.C.J. (April 7) (Request for Indication of Provisional Measures, Verbatim Record).

FN8. The majority reports that the confession in this case was voluntary. However, that conclusion was not based on a "totality of the circumstances" analysis that included the absence of consular notification as part of the examination.

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UNITED STATES, Appellee,
v.
Nai Fook Li, Defendant, Appellant.
United States, Appellee,
v.
Yiu Ming Kwan, Defendant, Appellant.
United States, Appellee,
v.
Ju Lin, Defendant, Appellant.
United States, Appellee,
v.
Ben Lin, Defendant, Appellant.
United States, Appellee,
v.
Hui Lin, Defendant, Appellant.
United States, Appellee,
v.
Mao Bing Mu, Defendant, Appellant.
United States, Appellee,
v.
Sang Li, Defendant, Appellant.

Nos. 97-2034, 97-2413, 98-1229, 98-1230, 98-1303,
98–1447, 98-1448.

United States Court of Appeals,
First Circuit.

Heard Dec. 7, 1999.

Decided Feb. 29, 2000.

Appeals From The United States District Court For The District Of Massachusetts [Hon. Robert E. Keeton, U.S. District Judge].

George F. Gormley and Edward P. Ryan, Jr., with whom George F. Gormley, P.C., Paul J. Garrity, O'Connor & Ryan, Chris H. Mangos, Charles W. Rankin, Catherine J. Hinton, Rankin & Sultan, Sara A. Rapport, Perkins, Smith & Cohen, and Heidi B. Shore were on brief for appellants.

William J. Aceves, Martin J. Newhouse, and Ropes & Gray on brief for the Human Rights Committee of The American Branch of the International Law Association, amicus curiae.

Thomas H. Speedy Rice, John T. Lu, Jean Terranova, and Silverglate & Good on brief for the National Association of Criminal Defense Lawyers, Massachusetts Association of Criminal Defense Lawyers and Amnesty International, amicus curiae.

Deborah Watson, Attorney, with whom Donald K. Stern, United States Attorney, Alex Whiting, Assistant United States Attorney, and Susan Hanson-Philbrick, Assistant United States Attorney, were on brief for appellee.

Before TORRUELLA, Chief Judge, SELYA, BOUDIN, LYNCH, STAHL, and LIPEZ, Circuit Judges.

OPINION EN BANC

STAHL, Circuit Judge.

*1 Defendants-appellants Hui Lin, Nai Fook Li, Yiu Ming Kwan, Ju Lin, Mao Bing Mu, Sand Li, and Ben Lin (the "appellants") appeal their convictions and sentences, which arose from a failed attempt to smuggle Chinese aliens into the United States. This opinion addresses their claim that the convictions and sentences should be overturned because the United States violated their purported rights under two international treaties. [FN1] We hold that even if the treaties granted individual rights to the appellants, the remedies they seek would be unavailable. Therefore, we reject the treaty-based challenges. A companion opinion issued today by the panel that originally heard the appeals addresses the various other claims raised by the appellants.

Factual Background

In December, 1995, Yiu Ming Kwan, a Chinese national, met in Boston with Michael Rendon, whom he believed owned a boat which could be hired to meet a freighter transporting illegal aliens from the People's Republic of China ("China") to the United States. Rendon was actually an undercover agent of the Immigration and Naturalization Service ("INS"). At the first meeting, Kwan told Rendon that his associates wished to smuggle about 100 illegal aliens into the United States. Rendon proposed a price of $500,000 to meet the smugglers' ship at sea, take in the aliens, and bring them into the United States on his vessel. After this preliminary discussion, Kwan asked Rendon to meet him and two associates at Logan International Airport the following day.

The next day, Rendon, along with Coast Guard Agent Rick Cox and two other agents, brought

Kwan, Hui Lin, and another male--the latter two also Chinese nationals--to view Rendon's craft. The vessel had a fifty-foot hold with a single light and a partial wooden plank floor. The hold contained no tables, chairs, windows, bathroom, or kitchen. The smugglers told the agents they were satisfied with the boat's accommodations.

On July 22, 1996, Rendon and Cox met with Kwan, Hui Lin, Nai Fook Li, and an unidentified man. At this meeting a site about 180 miles north of Bermuda was chosen as a rendezvous point. A discussion ensued about the spartan conditions in the hold of Rendon's vessel, and Hui Lin stated that the aliens "will have to sit there" and would not be able to sleep for the two days it would take for the craft to return to port. Nai Fook Li told Rendon that life jackets for each smuggled alien would not be necessary. Rendon sought and received assurances that the smugglers would assign individuals to his ship to control the aliens. A final price of $500,000 was agreed upon for the offloading of 120 aliens, plus $4,000 for each additional person. The smugglers also agreed to pay a $35,000 deposit to cover Rendon's expenses.

*2 Meanwhile, defendant Sang Li and others contacted individuals in China offering passage to the United States. Sang Li quoted prices between $20,000 and $30,000 per person, to be lent to the emigrants at very high interest rates. On or about August 11, 1996, those who took up the offer were loaded into the XING DA, a 210-foot freighter that had previously carried agricultural chemicals. Among the passengers were Sang Li, Mao Bing Mu, Ju Lin, and Ben Lin.

Eighty-three aliens were confined to the XING DA's hold for approximately 54 days as the ship traveled to the Bermuda rendezvous. Food in the hold consisted of buckets of rice and turnips lowered below twice each day. About once every ten days, each emigrant was given one bottle of water. The aliens were allowed above deck to use the bathrooms only during the daytime. The living area, which was never cleaned, thus became littered with urine and feces. Apparently, Sang Li and Mao Bing Mu directed one of the aliens on four or five occasions to ladle the human waste into a bucket. Several times, aliens in the hold attempted to steal additional food and water. Those who were caught were beaten. One alien as punishment was denied food for two days. Twenty-six of the passengers lived above deck.

Kwan kept Rendon apprised of the XING DA's position. On September 23, 1996, Rendon and Cox met with Kwan, Hui Lin, and Nai Fook Li. Li gave Cox the XING DA's current location and told him that approximately 120 people would be transferred from the XING DA to Rendon's vessel. Li agreed to board Rendon's vessel to help control the passengers. The men met again on September 25, 1996 and decided that Rendon's vessel would leave port on September 28 to meet the XING DA. Lin gave $5,000 to Nai Fook Li, who then gave it to Rendon to be used to obtain temporary shelter for the passengers upon arrival in the United States. At Cox's request, Hui Lin provided him another $1,000 for food. On September 27, 1996, the five men met again, and Hui Lin gave Rendon $29,000 to complete the deposit. It was agreed that the aliens would live in a warehouse until the defendants had paid the remainder of the $500,000 to Rendon, at which time the aliens would be taken to New York City.

On September 28, 1996, Rendon, Cox, Nai Fook Li, and four undercover agents apparently posing as Rendon's crew departed in the vessel heading for the rendezvous with the XING DA. The agents also had arranged for a Coast Guard cutter to trail their boat and intercept the XING DA.

*3 On October 2, 1996, a different Coast Guard cutter--the RELIANCE-- spotted the XING DA and followed it for about three miles. After the RELIANCE crew attempted to make contact several times, the XING DA finally responded and consented to be boarded by the Coast Guard. Officer Patrick Hilbert and seven other Coast Guard officers boarded the XING DA. When Hilbert asked who was in charge, Ju Lin represented that he was the ship's master. After Hilbert viewed the ship's documentation, a second boarding party came on board and discovered the eighty-three aliens in the hold.

The XING DA was taken to Bermuda. During this trip, the XING DA's crew retained operational control, and Ben Lin steered and handled the navigation. All aboard the XING DA were offloaded in Bermuda and flown to Guantanamo Bay, Cuba, where they were interviewed by INS officers.

During the week of November 18, 1996, after negotiations between the United States Department of State and the government of China, ninety-three aliens were repatriated and returned to China.

Meanwhile, on October 3, 1996, Hui Lin, Yiu Ming Kwan, and Nai Fook Li (the "land-based defendants") were arrested, and on October 8, 1996, an indictment was returned against them. On November 5, 1996, a superceding indictment was returned, adding Ju Lin, Ben Lin, Mao Bing Mu, and Sang Li (the "shipboard defendants") as defendants. The shipboard defendants, who had been detained at Guantanamo, were arrested on November 15, 1996 and were provided with counsel five days later. A final superceding indictment was issued on March 18, 1997, charging all defendants with (1) conspiracy to bring aliens into the United States for purposes of commercial advantage, in violation of 18 U.S.C. § 371; (2) alien smuggling in violation of 8 U.S.C. § 1324(a)(2)(B)(ii); (3) conspiracy to bring aliens into the United States at a place other than a designated port of entry in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(II); and (4) attempting to bring aliens into the United States at a place other than a designated port of entry in violation of 8 U.S.C. §§ 1324(a)(1)(A)(i), (v)(II).

On March 27, 1997, all seven defendants moved to dismiss the indictment on the grounds that the government failed to comply with the provisions of (1) Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, 1967 WL 18349 (ratified November 24, 1969) (the "Vienna Convention") and (2) Article 35 of the United States--People's Republic of China Bilateral Convention on Consular Relations, September 17, 1980, 33 U.S.T. 2973, 1982 WL 212240 (ratified February 19, 1982) (the "Bilateral Convention"). The shipboard defendants subsequently moved, on the same grounds, to suppress (1) all physical evidence seized from the XING DA; (2) all identifications made by any Chinese national who had not been notified of his or her purported rights under the treaties; and (3) all testimony regarding the events of the voyage by any Chinese national who had not been notified of his or her rights under the treaties.

On April 3, 1997, the district court denied the appellants' motions to dismiss and to suppress. First, the district court found that the treaties bestowed no enforceable rights upon individual detained aliens. Second, the court found that no constitutional or statutory provision conferred jurisdiction to enforce the treaties upon Article III courts. Third, the district court concluded that even if the appellants had standing to enforce the treaty, dismissal of the indictment would be an inappropriate remedy.

*4 Defendants Nai Fook Li, Yiu Ming Kwan, Hui Lin and Ju Lin each pled guilty to all four counts but reserved their rights to appeal the pretrial rulings. Following a twelve-day jury trial, defendants Ben Lin, Mao Bing Mu, and Sang Li were convicted on all four counts. The defendants were individually sentenced, with terms of imprisonment ranging from 36 months to 144 months, plus supervised release of 36 months each. All appellants challenged their sentences, and those defendants who went to trial contested their convictions as well. Although the appellants raise various arguments, we deal in this en banc opinion solely with those relating to the alleged violations of the Vienna Convention and the Bilateral Convention.

A three-member panel of this Court heard oral argument on April 6, 1999. On August 6, 1999, before the panel released an opinion, we issued a sua sponte order holding that the court would convene en banc to decide two issues related to the treaties:

> (1) Whether the Vienna Convention ... and/or the ... Bilateral [Convention] create individual rights as to consular notification and access, that are enforceable by such individuals in court proceedings, and
> (2) If so, is there a remedy (such as suppression of evidence or dismissal of the [indictments]) for past violations of these rights that can be invoked by a defendant in a criminal prosecution in a federal or state court?

Discussion

Those courts that have faced the issues before us have come to divergent conclusions as to whether the Vienna Convention and the Bilateral Convention bestow any rights upon individuals, as opposed to states. We need not, however, address these issues, for we believe that even if the treaties do confer individual rights, the appellants' claims could only succeed if violations of those rights could be remedied by the suppression of evidence or the dismissal of an indictment. We hold that irrespective of whether or not the treaties create individual rights to consular notification, the appropriate remedies do not include suppression of evidence or dismissal of the indictment. [FN2]

I. The Treaties

Article 36(1)(b) of the Vienna Convention states that the authorities of a "receiving state"--in this case, the United States--shall, without delay, inform any detained foreign national of his right to have the consular post of the "sending state"--in this case, China--notified of his detention. Vienna Convention, art. 36(1)(b). Article 36(1)(c) gives consular officers the right to visit and correspond with the detained foreign national and to arrange for his legal representation. See id. art. 36(1)(c).

Article 35(2) of the Bilateral Convention states that if a foreign national is detained, the authorities of the receiving state shall, within four days of the date of detention, notify the consulate of the sending state. See Bilateral Convention, art. 35(2). Moreover, the receiving country's authorities are required to advise the detainee of his right to communicate with a consular officer. See id. art. 35(3). The Bilateral Convention further guarantees a consular official's entitlement to visit and correspond with the detainee and to assist in arranging for legal representation and for an interpreter. See id. art. 35(4).

II. Interpreting the Treaties

*5 The United States Constitution provides that ratified treaties are to be regarded as the law of the land. See U.S. Const. art. VI, cl. 2. However, treaties do not generally create rights that are privately enforceable in the federal courts.

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress.... It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Head Money Cases, 112 U.S. 580, 598, 5 S.Ct. 247, 28 L.Ed. 798 (1884); see also Charlton v. Kelly, 229 U.S. 447, 474, 33 S.Ct. 945, 57 L.Ed. 1274 (1913); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 306, 7 L.Ed. 415 (1829) ("The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided."). "[E]ven where a treaty provides certain benefits for nationals of a particular state ... it is traditionally held that any rights arising from such provisions are, under international law, those of states and ... [that] individual rights are only derivative through the states." Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir.1990) (quoting United States ex. rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.1975)) (internal quotation marks omitted); see also Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir.1992); Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937-38 (D.C.Cir.1988).

Even stronger than the presumption against private rights of action under international treaties is the presumption against the creation of rights enforceable by the suppression of evidence or by the dismissal of an indictment. Historically, such remedies have been available only in cases implicating the most fundamental of rights. This class has heretofore been limited to those paramount protections secured by the Fourth, Fifth, and Sixth Amendments to the United States Constitution. See, e.g., Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (Fifth Amendment); Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) (Sixth Amendment); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (Fourth Amendment); see also United States v. Hensel, 699 F.2d 18, 29 (1st Cir.1983) (observing that the exclusionary rule is designed "to protect certain specific, constitutionally protected rights"); United States v. Rodrigues, 68 F.Supp.2d 178, 185 (E.D.N.Y.1999) ("[A]s the effect of [suppression] is the loss of relevant and probative evidence, this remedy is not applied for every violation of a federal law but is reserved only for breaches of the most basic constitutional rights.").

Article 36 of the Vienna Convention, and the complementary Article 35 of the Bilateral Convention, do not create--explicitly or otherwise--fundamental rights on par with the right to be free from unreasonable searches, the privilege against self-incrimination, or the right to counsel. See, e.g., United States v. Ademaj, 170 F.3d 58, 67 (1st Cir.1999) ("[T]he Vienna Convention itself prescribes no judicial remedy or other recourse for its violation."); Waldron v. INS, 17 F.3d 511, 518 (2d Cir.1993) ("Although compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights."); United States v. Chaparro-Alcantara, 37 F.Supp.2d 1122, 1125 (N.D.Ill.1999) ("It is clear that Article 36 does not create a 'fundamental' right, such as the Sixth Amendment right to counsel, or the Fifth Amendment right against self-incrimination which originates from concepts of due process."). Defendants who assert violations of a statute or treaty that does not create fundamental rights are not generally entitled to the suppression of evidence unless that statute or treaty provides for such a remedy. See, e.g., United States v. Thompson, 936 F.2d 1249, 1252 (11th Cir.1991) ("Absent a specific reference to an exclusionary rule, it is not appropriate for the courts to read such a provision into [an] act."); United States v. Kington, 801 F.2d 733, 737 (5th Cir.1986) (holding that rights created by Congress are not enforceable by suppression unless Congress has specifically provided for that remedy); Chaparro-Alcantara, 37 F.Supp.2d at 1125 ("[Article 36] does not create a 'fundamental' right," and therefore "the suppression remedy must be available, if at all, from the Vienna Convention itself.").

*6 Nor are such defendants entitled to the dismissal of an indictment: "Because the public maintains an abiding interest in the administration of criminal justice, dismissing an indictment is an extraordinary step." United States v. Stokes, 124 F.3d 38, 44 (1st Cir.1997); see also United States v. Morrison, 449 U.S. 361, 365, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981) (concluding that the dismissal of an indictment was unwarranted absent a constitutional violation that prejudiced defendant's case); Whitehouse v. United States Dist. Court, 53 F.3d 1349, 1359 (1st Cir.1995) ("When a federal court uses its supervisory power to dismiss an indictment it directly encroaches upon the fundamental role of the grand jury. That power is appropriately reserved, therefore, for extremely limited circumstances."); United States v. Carrillo, 70 F.Supp.2d 854, 862 (N.D.Ill.1999) (holding that violation of Vienna Convention would not require suppression of evidence or dismissal of indictment). Thus, we will infer neither an entitlement to suppression nor an entitlement to dismissal absent express, or undeniably implied, provision for such remedies in a treaty's text. We find no such provision here.

A. The Treaties' Texts

*7 "In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning." United States v. Alvarez-Machain, 504 U.S. 655, 663, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992); see also Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988); Marquez-Ramos v. Reno, 69 F.3d 477, 480 (10th Cir.1995); Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 638 (5th Cir.1994). But the Vienna Convention and the Bilateral Convention are both facially ambiguous on the subject of whether they create individual rights at all, and do not even address whether those rights would justify suppression of evidence or the dismissal of an indictment. First, it is far from clear that the Vienna Convention confers any rights upon criminal defendants. Cf. Breard v. Greene, 523 U.S. 371, 118 S.Ct. 1352, 1356, 140 L.Ed.2d 529 (1998) ("[N]either the text nor the history of the Vienna Convention clearly provides a ... right of action in United States' courts to set aside a criminal conviction and sentence for violation of consular notification provisions."). The appellants emphasize the privileges purportedly conferred by Article 36, but the Vienna Convention's preamble explicitly disclaims any attempt to create individual rights: "[T]he purpose of such privileges and immunities [as are created by the treaty] is not to benefit individuals but to ensure the efficient performance of functions by consular posts." Preamble to Vienna Convention, 21 U.S.T. 77, 79. Moreover, the preamble's drafters cite an intent to "contribute to the development of friendly relations among nations" without ever mentioning any intent to equip defendants with the extraordinary remedies sought by appellants. Id.

The Bilateral Convention, too, is ambiguous. Article 35 is replete with references to consular officers' entitlements, see Bilateral Convention arts. 35(1), 35(4), 35(5), 35(6), but only once speaks of the "rights" of detained nationals, and never proposes any particular remedies for the violation of any such rights. Article 35(3) reads as follows:

> The competent authorities of the receiving state shall immediately inform the national of the sending State of the rights accorded to him by this Article to communicate with a consular official.

This language, however, offers insufficient support for appellants' arguments. Even if we were to hold that Article 35(3) in fact provided individuals with judicially enforceable rights--and we decline to so hold in this case--this language hardly justifies the inference that violation of such rights should be remedied via the suppression of evidence or the dismissal of an indictment. As described above, these remedies are reserved for extraordinary encroachments upon the most fundamental individual rights. Nothing in Article 35(3) of the Bilateral Convention suggests that the "rights" to which it refers are at all comparable to the right to be free from unreasonable searches and seizures, the privilege against self-incrimination, or the right to representation during a criminal proceeding.

Indeed, the balance of Article 35 clearly mitigates any focus on the individual that section (3) might suggest. Even those provisions that arguably serve the interests of criminal defendants are couched instead in terms of the interests of the consular officer. Thus, for example, Article 35(1) provides that "[a] consular officer shall be entitled ... to communicate and meet with any national of the sending State," and Article 35(4) states that "[a] consular officer shall be entitled to visit a national of the sending State who has been arrested." We believe that if the authors of the Bilateral Convention intended Article 35 to confer fundamental individual rights of the sort that could be remedied by suppression or dismissal, they would have drafted that Article in terms of those rights, rather than focusing so intently upon the entitlements of consular officers--officers whose protections under such a clause would be far less reaching than those of criminal detainees.

B. Nontextual Sources

*8 To the extent that the treaties' terms are ambiguous with respect to the issue before us, we will rely upon nontextual sources "such as the treaty's ratification history and its subsequent operation." United States v. Stuart, 489 U.S. 353, 366, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989).

1. State Department Interpretation

We first consult the United States Department of State's interpretation of the two treaties, to which we accord substantial deference. See, e.g., El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S.Ct. 662, 671, 142 L.Ed.2d 576 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); Kolovrat v. Oregon, 366 U.S. 187, 194, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961) (same).

In the State Department's view, the treaties do not create individual rights at all, much less rights susceptible to the remedies proposed by appellants. After "devot[ing] considerable time to the issue," see Department of State Answers to the Questions Posed by the First Circuit in United States v. Nai Fook Li ("Answers") at A-2, the State Department has concluded that

> [t]he [Vienna Convention] and the US-China bilateral consular convention are treaties that establish state-to-state rights and obligations.... They are not treaties establishing rights of individuals. The right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned.

Id. at A-3; see also id. at A-1. "The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." See id. at A-3. [FN3]

*9 Nor is the State Department's position of recent origin. A 1970 letter sent by a Department legal adviser to the governors of the fifty states shortly after the Vienna Convention's ratification advised that the Department did "not believe that the Vienna Convention will require significant departures from the existing practice within the several states of the United States." Needless to say, the creation of rights on par with those guaranteed by the Fourth, Fifth, and Sixth Amendments to the United States

Constitution would constitute just the sort of "significant departure[ ]" disclaimed by this letter. Accordingly, the Department has denied the availability of criminal remedies for failures of consular notification. In 1989, a letter from a Department legal adviser informed a foreign national being held in an American prison that "[w]hile the U.S. authorities are required to comply with the obligations [of Vienna Convention Article 36], failure to do so would have no effect on [his] conviction or incarceration."

Moreover, the State Department has advanced the same view before at least two international tribunals. In 1998, Paraguay brought suit against the United States in the International Court of Justice ("ICJ"). Paraguay, which sought to halt the execution of a Paraguayan national named Angel Breard in the Commonwealth of Virginia, argued that Breard had not received consular notification and that his conviction was therefore tainted. In an oral presentation to the ICJ, a State Department Assistant Legal Adviser for United Nations Affairs offered the following response:

> Paraguay's Application maintains that the necessary legal consequence for any ... breach [of the consular notification obligation] is that [an] ensuing conviction and sentence must be put aside. There is absolutely no support for this claim in the language of the [Vienna] Convention. The Court should not read into a clear and nearly universal multilateral instrument such a substantial and potentially disruptive additional obligation that has no support in the language agreed by the parties.

Verbatim Record (Paraguay v. U.S.), 1998 I.C.J. 426, at 3.20.

The issue also arose in the Inter-American Court of Human Rights ("IACtHR") in 1998, when Mexico sought an advisory opinion on the availability of criminal remedies for failures of consular notification. [FN4] In a written submission to the IACtHR, counsel for the State Department argued that the Vienna Convention "does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation." Written Observations of the United States of America, Request for Advisory Opinion OC-16, June 1, 1998 (corrected June 10, 1998).

2. Legislative History

*10 Legal materials produced contemporaneously with the two treaties' passages comport with the State Department's view that they do not confer rights the violation of which can be remedied in the criminal courts. For example, a State Department legal adviser submitted written testimony on the Vienna Convention to the Senate Committee on Foreign Relations on October 7, 1969. The statement indicated that "[t]he Vienna ... Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions," except with respect to a warrant requirement not relevant here. The Department's testimony also emphasized the Vienna Convention's above-quoted preamble, which states explicitly that the treaty's purpose is "not to benefit individuals." Appendix, Sen. Doc. Exec. E, 91st Cong., 1st Sess. (1969).

Two weeks later, the Senate Committee on Foreign Relations transmitted the Vienna Convention to the full Senate and recommended ratification. Committee Chairman Senator J. William Fulbright included a short accompanying Report. The Report again highlighted the treaty's preamble and then listed five factors that helped to secure the Committee's approval. The first factor was the Committee's belief that "[t]he [Vienna] Convention does not change or affect present U.S. laws or practice." Sen. Doc. Exec. E, 91st Cong., 1st Sess. (1969).

The Committee on Foreign Relations appended a similar Report when it sent the Bilateral Convention to the full Senate in 1981. Like the treaty itself, the Report characterized Article 35 only in terms of the entitlements bestowed upon consular officials:

> Article 35 ... guarantees that a consular officer of a sending state will be notified within a maximum of four days of the arrest or detention of a national of the sending state. The consular official is further entitled to visit such national within two days from the date of the notification of arrest or detention as well as to attend the trial of such person.

Sen. Exec. Rep. No. 97-14, 97th Cong., 1st Sess (1981). [FN5] The Committee appended to the Report testimony from Assistant Secretary of State John H. Holdridge, who also cast the treaty's consular notifications provisions in terms of the privileges conferred upon consular officials, rather than upon criminal defendants. See id.

3. The Treaties' Historical Application

Finally, the manner in which the Vienna Convention and the Bilateral Convention have been treated since their ratification confirms the lessons learned from the State Department's interpretation and the treaties' legislative histories: Individual defendants deprived of consular notification are not entitled to raise their treatment as a defense against criminal prosecution.

Indeed, the State Department is apparently "unaware of any country party to any consular convention with the United States that remedies failures of notification through its criminal justice process. Criminal justice systems vary throughout the world and in [the State Department's] experience operate independently of consular notification." Answers at A-1. "Many, if not most, of the countries with which the United States raises concerns that consular notification obligations have been violated with respect to U.S. citizens will undertake to investigate the alleged violation and, if it is confirmed, to apologize for it and undertake to prevent future recurrences." Id. at A-3. This representation accords with that made to the ICJ by the State Department's Assistant Legal Adviser for Consular Affairs during the dispute with Paraguay described above. She stated that the Department was "not aware of any practice [among signatories to the Vienna Convention] of attempting to ascertain whether [a] failure of notification prejudiced the foreign national in criminal proceedings." Verbatim Record (Paraguay v. U.S.), 1998 I.C.J. 426, at 2.15. As she asserted, "[t]his lack of practice is consistent with the fact and common international understanding that consular assistance is not essential to the criminal proceeding against a foreign national." Id.

The Department's written directives to United States consular officers are also instructive. The Foreign Affairs Manual ("FAM") urges United States consular officials aggressively to pursue contact with American nationals detained abroad, and to raise concerns about failures of consular notification with the receiving country. See 7 FAM 410. Nowhere, though, does the FAM state or imply that such failures might be redressed in the host country's criminal justice system. Thus, the United States has never, to the Department's knowledge, asked a foreign court to consider a failure of consular notification during deliberation on a criminal case. These practices evidence a belief among Vienna Convention signatory nations that the treaty's dictates simply are not enforceable in a host nation's criminal courts, and do not warrant suppression or dismissal in any event.

Conclusion

*11 The remedies sought by appellants are unavailable to them under either the Vienna Convention or the Bilateral Convention. Therefore, irrespective of whether those treaties create individual rights, the defenses asserted must be denied.

The appellants' treaty-based challenges are rejected, and the balance of this case is remitted to the panel.

Separate opinions follow.

SELYA and BOUDIN, Circuit Judges (concurring).

Judge Stahl's sterling opinion for the en banc court properly lays stress on the lack of basis for the principal remedy sought in these cases. That remedy-- the exclusion of otherwise legitimate evidence--is nowhere suggested in the treaties at issue and courts ordinarily do not provide such remediation in the absence of a constitutional violation. The record before us offers no meaningful reason to stray from that well-trod path. Thus, we join the court's opinion. We write separately, however, because we believe that, even without reaching the remedy question, the appellants' argument lacks force.

We arrive at this position essentially by drawing logical conclusions from many of the same considerations that are noted in the court's opinion. It is common ground that the treaties in question are agreements among sovereign States. Nothing in their text explicitly provides for judicial enforcement of their consular access provisions at the behest of private litigants. Of course, there are references in the treaties to a "right" of access, but these references are easily explainable. The contracting States are granting each other rights, and telling future detainees that they have a "right" to communicate with their consul is a means of implementing the treaty obligations as between States. Any other way of phrasing the promise as to what will be said to detainees would be both artificial and awkward.

Even if such references sufficed to make the treaties ambiguous as to an intent to create private rights--an assumption that we believe is unwarranted and that we indulge solely for argument's sake--the end result would be the same. Ambiguity brings into play the background presumption in respect to treaties between States--a presumption which holds that they do not create rights that private parties may enforce in court. See, e.g., Goldstar v. United States, 967 F.2d 965, 968 (4th Cir.1992); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C.Cir.1984) (Bork, J., concurring). This presumption certainly can be overcome by explicit language that is easy to draft and to insert, just as a contract can provide expressly that rights created by it may be enforced in court by a third-party beneficiary. In addition, rights-granting language occasionally may make sense only on the premise that it confers a right enforceable by a private citizen in the courts of the other country. See, e.g., Clark v. Allen, 331 U.S. 503, 507-08, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947) (dealing with language that involved non- citizens' rights to inherit property equally with citizens). But apart from these narrow circumstances, the presumption rules.

In this instance, the treaties contain no explicit language conferring on private citizens rights enforceable in court, and there is nothing in the character of the subject matter that compels (or even suggests) an inference in favor of private rights. To the contrary, it is entirely reasonable to think that States themselves will enforce their right to afford consular access to detained citizens; after all, States normally seek to protect their own citizens in foreign lands and consular access facilitates a State's carrying out of that responsibility. Cf. Preamble to Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 79 (ratified Nov. 24, 1969) (describing treaty as ensuring "efficient performance of functions of consular posts"). In sum, there is every incentive to treat the background presumption as the reality in these cases--and no viable rationale for disregarding it.

*12 The other very powerful reason for reaching this conclusion is that the State Department in substance supports it. As we have held in other cases, the State Department's view is entitled to substantial weight in treaty interpretation. See United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir.), stay denied, 520 U.S. 1206, 117 S.Ct. 1491, 137 L.Ed.2d 816 (1997). This is true partly because the State Department negotiates and administers such treaties, but it is also true partly because, when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice. That voice is the voice of the State Department, which in such matters speaks for and on behalf of the President.

The background presumption that treaties do not create privately enforceable rights and its corollary--that the State Department's view to this effect will receive respectful consideration--are extremely important principles that reverberate far beyond these cases. We believe that those principles warrant our adherence and our support. [FN1] This is especially so because, in a shrinking world, the number of treaties to which the United States is a party has proliferated. It is surpassingly difficult to accept the idea that, in most instances, either the Executive Branch or the ratifying Senate imagined that it was empowering federal courts to involve themselves in enforcement on behalf of private parties who might be advantaged or disadvantaged by particular readings of particular treaty provisions.

Our dissenting brother's emphasis on the self-executing character of the treaties in question does not sway our thinking. The label "self-executing" usually is applied to any treaty that according to its terms takes effect upon ratification and requires no separate implementing statute. See Restatement (Third) of Foreign Relations Law § 111(4) (1987). Whether the terms of such a treaty provide for private rights, enforceable in domestic courts, is a wholly separate question. [FN2] See id. at § 111, cmt. h. That courts sometimes discuss both concepts together, see, e.g., Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937 (D.C.Cir.1988), does not detract from their distinctiveness. At bottom, the questions remain separate. See id. at 937-38. It follows inexorably that the self-executing character of a treaty does not by itself establish that the treaty creates private rights.

We need go no further. There is an elaborate regime of practices and institutions by which the United States and other nations enforce commitments inter sese or decide that, in the national interest, promises given by or to another sovereign should not be enforced in a specific case. Sometimes this is done purely for reasons of prudence, sometimes for convenience, or sometimes to secure advantage in unrelated matters. Incalculable mischief can be wrought by gratuitously introducing into this often delicate process court enforcement at the instigation of private parties. We believe that such a course is to be avoided unless it can be said that private enforcement was clearly agreed to and envisioned by the contracting States in the treaties themselves. That is plainly not the case here.

TORRUELLA, Chief Judge (concurring in part; dissenting in part).

*13 I concur with the majority opinion in affirming the judgment of conviction of appellants Hui Lin, Nai Fook Li, Yiu Ming Kwan, and Ju Lin. These appellants failed to preserve for appeal, their rights under Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S.261, 1967 WL 18349 (ratified November 24, 1969) (hereinafter "Vienna Convention") and Article 35 of the United States–People's Republic of China Bilateral Convention on Consular Relations, September 17, 1980, 33 U.S.T. 2973, 1982 WL 212240 (ratified February 19, 1982) (hereinafter "Bilateral Treaty"). See, e.g., Breard v. Greene, 523 U.S. 371, 118 S.Ct. 1352, 1354- 55, 140 L.Ed.2d 529 (1998) (appellant procedurally defaulted his claim under the Vienna Convention by not raising and preserving the issue). However, such is not the case with respect to appellants Mao Bing Mu, Sang Li, and Ben Lin (hereinafter referred to collectively as the "appellants"). They did raise and preserve for appeal the issues before us regarding Article 36 of the Vienna Convention and Article 35 of the Bilateral Treaty. It is as to them and those issues that I respectfully disagree with my colleagues in the majority.

It is my view that the Government of the United States failed to comply with Articles 36 and 35, respectively, in not advising appellants upon their detention of their right to consular assistance. These provisions, once ratified by the Senate, constitute self-executing municipal law of the United States, which is individually enforceable in the courts of this country upon proper request by an affected detainee. Notwithstanding this conclusion, because the record has not been fully developed as to the possible prejudice that may have been suffered by appellants by reason of the violation of their rights, I would remand this case to the district court for an inquiry into these matters. Furthermore, if prejudice is found, the district court is initially in a better position to fashion a remedy, and I would thus defer to such a finding in the first instance.

Because such is my opinion, the thrust of my comments are directed to the first of the two issues for which the en banc court was convened: whether the Vienna Convention and/or the Bilateral Treaty create individual rights to consular notification and access that are enforceable by such individuals in court proceedings. Cf. Breard v. Greene, 118 S.C. at 1355 (the Vienna Convention "[a]rguably confers on an individual the right to consular assistance following arrest") (emphasis supplied).

I. Individual Rights Were Created By The Vienna Convention and The Bilateral Treaty

*14 Although our Nation is one in which the rule of law is cherished in action as well as principle, and the maxim pacta sunt servanda has flourished, most courts facing claims such as are before us have side-stepped the enforcement of the rights established under the Vienna Convention and Bilateral Treaty, even in the face of finding a violation of treaty obligations entered into by the United States. See Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir.1996) ("Texas admits that the Vienna Convention was violated"); Breard v. Netherland, 949 F.Supp. 1255, 1263 (E.D.Va.1996) ("Virginia's persistent refusal to abide by the Vienna Convention troubles the Court"). This Court has unfortunately chosen to follow suit.

The ensuing colloquy took place before the panel originally hearing this appeal:

> The Court: Does it [the Vienna Convention] require that the individual be notified immediately?
> Government Counsel: Well, yes it does. There is no question that this treaty was violated in this instance and the United States is not saying that it wasn't violated. We are simply saying that no court has granted a defendant any kind of relief in the absence of a showing of prejudice.

Oral Argument of April 6, 1999. Government counsel's frankness in admitting the obvious is commendable, although more recently the Justice Department seems to have retrogressed from this position, and, as is apparent from the majority opinion, the concessions made at oral argument are for naught. [FN1]

At least part of the majority's confusion stems from its basic misconception as to the nature of the rules that are before the Court. We are no longer merely considering international agreements to be administered or enforced at the discretion of the State Department, in which its interpretation as to applicability is entitled to special expertise or deference. Cf. United States v. Stuart, 489 U.S. 353, 369, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989) ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight"). As will be further elucidated, once ratified by the Senate, both the Vienna Convention and the Bilateral Treaty became the municipal law of the United States pursuant to the Supremacy Clause, [FN2] and its provisions enforceable in the courts of the United States at the behest of affected individuals without the need for additional legislative action.

II. The Self-Execution of Treaties in the United States

*15 In stating the "general rule" that treaties do not create individually enforceable rights, the majority completely ignores the well-established doctrine of self-execution. See, e.g., United States v. Green, 671 F.2d 46, 50 (1st Cir.1982). I recognize that the interplay between the general rule and the doctrine of self-execution has been confused over the years, but that confusion stems from the failure to take into account the origins of the doctrine of self-execution as well as the reasoning that led to its creation. See generally Carlos Manuel Vazquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l 695, 699 (1995).

The general rule has its roots in English law. See J.G. Starke, Introduction to International Law 81-82 (10th ed.1998); J.G. Collier, Is International Law Really Part of the Law of England?, 38 Int'l & Comp. L.Q. 924, 925-26 (1989) (citing The Parliament Belge, 4 P.D. 129 (1879)); see also Ware v. Hylton, 3 U.S. (3 Dall.) 256, 274-275, rev'd on other grounds, 3 U.S. (3 Dall.) 199, 1 L.Ed. 568 (1796). In the English system, treaties are entered into, and concluded, by the Crown without any intervention by Parliament. Consequently, treaties are ineffectual domestically without implementing legislation from Parliament.

Dissatisfaction with that system, and the anarchical consequence that binding treaties were often practically unenforceable, led our Founding Fathers to abandon the English system in favor of our Constitution's system of treaty negotiation by the Executive and ratification by the Senate. By its unambiguous text the Supremacy Clause declares treaties to be "the supreme Law of the Land", and thus automatically incorporates these international agreements into the domestic law of the United States, without the need for further action once the treaty is ratified by the Senate. The effect is to render treaty provisions enforceable in the courts at the behest of affected individuals, in applicable cases. See United States v. Alvarez Machain, 504 U.S. 655, 667, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992) ("The Extradition Treaty has the force of law, and if ... it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation"); United States v. Puentes, 50 F.3d 1567, 1575 (11th Cir.1995) (same). Contra Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C.Cir.1984) (Bork, J., concurring) ("Treaties in the United States do not generally create rights that are privately enforceable in courts").

In one of the first cases to consider the applicability of the British rule under our constitutional system, the Supreme Court stated that:

> In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.

*16 Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314, 7 L.Ed. 415 (1829); cf. United States v. Percheman, 32 U.S. (7 Pet.) 51, 8 L.Ed. 604 (1833); see also Edye v. Robertson("Head Money Cases"), 112 U.S. 580, 598-99, 5 S.Ct. 247, 28 L.Ed. 798 (1884) ("A treaty, then is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.")

Unfortunately, we are no longer in the same playing field that existed when the Court decided Foster and Perchman, whose holding has since been distorted beyond recognition with the tail end of the quoted language often wagging the principal rule established by those cases. Cf. Goldstar (Panama), S.A. v. United States, 67 F.2d 965, 968 (4th Cir.1992); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir.1985); Cardenas v. Smith, 733 F.2d 909, 918 (D.C.Cir.1984); Tel-Oren v. Libyan Arab Republic, supra; British Caledonian Airways v. Bond, 665 F.2d 1153, 1160 (D.C.Cir.1981); United States v. Postal, 589 F.2d 862, 874 (5th Cir.1979). [FN3] The bottom line to these cases seems to be that we should look to the "intent" of the treaty to determine whether it is self-executing, or more in point, whether it creates rights that individuals can enforce in the courts. As the majority purports to recognize, however, we begin this inquiry with the terms of the treaty. See Alvarez-Machain, 504 U.S. at 366 (courts look first to a treaty's terms to determine its contents); Stuart, 489 U.S. at 365-66 ("the clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories'."). If we look to this guideline as the starting point to our inquest in the present appeal, I fail to see why further analysis is required or is appropriate.

III. The Text of Articles 36 and 35 of the Vienna Convention and Bilateral Treaty

Contrary to the majority's characterization, the language of the Vienna Convention and the Bilateral Convention is anything but ambiguous. Section 36(1)(b) unequivocally states that:

> The ... authorities shall inform the person [detained] ... without delay of his rights [to consular notification and assistance].

(Emphasis supplied). This language, particularly that which I have emphasized, (1) mandates ("shall") action, (2) without delay, (3) by the detaining "authorities," which action is, (4) to "inform" the detained "person", (5) "of his," (6) "rights" to seek assistance from his consular representatives. This provision does not entail arcane or obscure parlance, or require the application of complex notions or of concepts that are difficult to understand or decipher. It simply requires a detaining authority in the United States, as soon as a foreign national is detained, to inform him or her of their right to request consular assistance with regards to the detention.

*17 Were we dealing with such text in a statute originally enacted by Congress rather than this species of "Law of the Land," is there any doubt as to how this provision would be interpreted? We might very well quarrel, for example, as to how much time could pass after detainment before the failure to notify the alien of his/her rights was unreasonable, or there might be an issue as to whether there was a "detention" such as triggered the notification obligations imposed upon the authorities, or such other scenarios as are commonly litigated under similar doctrines, such as Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). But it is almost beyond cavil, were we faced with facts such as are presented by this appealed, with a statute reading as does Article 36, that the outcome would be preordained. The authorities would be found to have violated appellants' rights in failing to inform them of their right to consular assistance while detained for approximately 50 days and shipped from one side of the globe to the other and back again.

In fact I have some difficulty envisioning how it is possible to frame language that more unequivocally establishes that the protections of Article 36(1)(b) belong to the individual national, and that the failure to promptly notify him/her of these rights constitutes a violation of these entitlements by the detaining authority. I must also confess to no small amount of bafflement, not to say disappointment, with the reluctance demonstrated by my colleagues in the majority, as well as other courts, in refusing to provide a forum for the vindication of what amounts to a confessed and flagrant violation of our national law by the Government. I would ask, what arena is more appropriate than the courts of the United States, for an individual to seek the validation of his/her rights against Governmental transgression of its own laws and regulations? See Fort Stewart Schs. v. FLRA, 495 U.S. 641, 654, 110 S.Ct. 2043, 109 L.Ed.2d 659 (1990) (citing Vitarelli v. Seaton, 359 U.S. 535, 547, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959), and Service v. Dulles, 354 U.S. 363, 388, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957)). "Indeed, given that a treaty should generally be 'construe[d]

... liberally to give effect to the purpose which animates it' and that '[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred,' " Stuart, 489 U.S. at 368, I am at a loss to find rhyme or reason in the majority's conclusions.

The majority makes much of the preamble to the Vienna Convention, which states, inter alia:

> *18 The State Parties to the present Convention, ...Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, ... Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states, ... Have agreed as follows.

23 U.S.T. at 3230 (emphasis supplied). The majority argues that the underscored language specifically excludes the claim of individual rights made by appellants. I find this a specious contention.

It is clear that in the context in which this provision is framed (e.g., "such privileges and immunities"), it refers to the privileges and immunities of "diplomatic agents" qua diplomatic agents, and not with respect to the individual rights established in Article 36(1)(b) for the benefit of detained nationals. See United States v. Rodrigues, 68 F.Supp.2d 178, 182 (E.D.N.Y.1999); see also Mark Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul, 18 Mich. J. Int'l L. 565, 594 (1997).

I would add that reliance on this language to attempt to defeat appellants' claim of individual rights has an additional downside for those espousing this dubious position. If the inclusion of this language in the preamble to the Vienna Convention has the significance attributed to it, then the exclusion of this same wording from the preamble or text of the Bilateral Treaty with China, a specific accord on a similar subject which postdates the multinational Vienna Convention by thirteen years, should lead to the opposite conclusion, that is, it should mean that individuals do have such rights under the Bilateral Treaty. However such mental gymnastics are unnecessary, because the Bilateral Treaty's language is even more precise than that of the Vienna Convention in establishing individual rights.

Not only does the preamble of the Bilateral Treaty explicitly state as one of the goals of this treaty, "the protection of the rights and interests of their nationals ....," (emphasis supplied), stated as a separate item from the goal of protecting the interests of the contracting nations, but Article 35(3) of this treaty precisely requires that:

> The competent authorities of the receiving State shall immediately inform the national of the sending State of the rights accorded to him by this Article to communicate with a consular officer.

(Emphasis supplied). This explicit detailing of the obligation and concurrent right should require us to proceed no further in our recognition of appellants' claims. However, the majority's reliance on so-called "nontextual sources" and "legislative history" as support for its conclusions, forces us to reluctantly delve into that morass, notwithstanding the good advice that caution us to the contrary when statutory language is unambiguous. See Immigration & Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 452, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (Scalia, J. concurring) ("[I]f the language of a statute is clear, that language must be given effect ... at least in the absence of a patent absurdity."). In any event, the "nontextual sources" and "legislative history" cited by the majority in actuality fully support appellants' contentions.

IV. The Background to Article 36 of the Vienna Convention

*19 Of all the provisions of the Vienna Convention, the one with the "most tortured and checkered background is indubitably Article 36." See Luke Lee, Vienna Convention on Consular Relations 107 (1996). This provision was the subject of extensive and divisive debate before it was finally approved, with the differences centering mostly on the question of the foreign national's autonomy and rights under the proposed Article 36. Id. at 107-14; see also 1 United Nations Conference on Consular Relations: Official Records, at 3, U.N. Doc. A/Conf. 25/6, U.N. Sales. No.63.X.2 (1963) (hereinafter "U.N. Official Records").

The positions of the delegates from the United

Kingdom and Australia were typical of the prevailing view. The former expressed his rejection of a proposal that a consul be notified only if the detained national so requested, because "[i]t could well make the provisions of Article 36 ineffective because the person arrested might not be aware of his rights." Id. at 83-84 (emphasis supplied); see also id. at 339, 344. The Australian delegate stated along a similar vein, that "[t]here was no need to stress the extreme importance of not disregarding, in the present or any other international document, the rights of the individual." Id. at 331 (emphasis supplied). In fact the United States delegate proposed an amendment to Article 36(1)(b) that the notification to a consul of a national's detention be made at the request of the national, "to protect the rights of the national concerned." Id. at 337 (emphasis supplied). From these and other statements by the various national delegates there should be little doubt that the treaty under consideration concerned not only consular rights but also the separate individual rights of detained nationals. Id. at 37 (statement of Soviet delegate); id. at 37, 82, 85, 339, 345 (statements of Tunisian delegate); id. at 38 (statement of Congolese delegate); id. at 339 (statement of Greek delegate); id. at 338 (statement of the Korean delegate); id. at 332, 344 (statement of Spanish delegate); id. at 81, 339, 340-01 (statement of the Indian delegate); id. at 82, 332 (statement of the French delegate); id. at 84 (statement of the Federal Republic of Germany); id. (statement of the delegate of Brazil); id. at 331 (statement of the delegate of Venezuela); id. at 332 (statement of the delegate of Kuwait); id. at 335 (statement of the Swiss delegate); id. at 336 (statement of the delegate of New Zealand); id. at 343 (statement of the delegate of Ecuador); see also Mark Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search For the Right to Counsel, 18 Mich. J. Int'l L. 565 (1997) (discussing the Vienna Convention's history in this respect); Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963 (hereinafter "U.S. Vienna Report").

During the course of the debate, the United Kingdom submitted the amendment to Article 36 that eventually became the final approved version of paragraph (b)(1), requiring the detaining nation to inform the detained foreign national of his/her right to consular access. The amendment was adopted 65 votes to 2, with 12 abstentions. The United States delegate voted in favor of the amendment. See U.S. Vienna Report at 60.

*20 The Letter of Submittal of Secretary of State William P. Rodgers to the President dated April 18, 1969 is enlightening. In it Secretary Rodgers, in referring to Article 36(1)(b) indicates that:

> It requires that authorities of the receiving State inform the person detained of his right to have the fact of his detention reported to the consular post concerned and his right to communicate with that consular post. If he so requests, the consular post shall be notified without delay.

(Emphasis supplied).

The U.S. Vienna Report, which is attached to the Letter of Transmittal states the following:

> The solution adopted by the Conference to the problem of adjusting the notification obligations of the receiving State to the right of the individual concerned to request notification lies in the final sentence of subparagraph 1(b). That sentence requires authorities of the receiving State to inform the person detained of his right to have the fact of his detention reported to the consular post concerned and of his right to communicate with that consular post. This provision has the virtue of setting out a requirement which is not beyond means of practical implementation in the United States, and, at the same, is useful to the consular service of the United States in the protection of our citizens abroad.

(Emphasis supplied).

The Letter of Transmittal also includes the Report from the Committee on Foreign Relations reporting favorably on the Vienna Convention and recommending that the Senate give its advice and consent to the same. See Sen. Exec. Rep. 91-9, 91st Cong., 1st Sess. (1969). The Senate Report attaches the testimony of J. Edward Lyerly, the Deputy Legal Advisor for Administration before the Committee in which he states at the outset that "[t]he Convention is considered entirely self-executive and does not require any implementing or complementing legislation." (Emphasis supplied).

There is further evidence in actions taken by the State Department ante litigio, supportive of appellants' claims. [FN4] Much can be found in the Department's booklet entitled "Consular Notification and Access," a document instructing federal, state, and local law enforcement personnel regarding foreign nationals in the United States and their rights to consular notification and access. [FN5] See Government's Supplemental Appendix on Rehearing En Banc, Vol. II. Under the rubric of "Summary of Requirements Pertaining to Foreign Nationals," the first directive states that: "1. When foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified." Id. at 467. Later in this document there are "Suggested Statements to Arrested or Detained Foreign Nationals." Id. at 469. For example: "In all cases, the foreign national must be told of the right of consular access." Id. (emphasis in the original). This statement is repeated in like form on the next page. Id. at 472; see also id. at 477, 483, 484. The booklet also restate's Mr. Layerly's averment before the Senate to the effect that "[i]mplementing legislation is not necessary (and the Vienna Convention and bilateral agreements are thus "self executing") because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers." Id. at 484 (emphasis supplied). Last but not least, the State Department thoughtfully provides a model "Consular Notification and Access Card" with the suggested statement to be made to the detained foreign national notifying him of his rights.

Not surprisingly, and I would add reassuringly to those of us that occasionally find ourselves outside the confines of our national borders, [FN6] the State Department vis-a-vis U.S. citizens arrested or detained in foreign lands, [FN7] takes a position similar to appellants in this case. In its Foreign Affairs Manual, the State Department indicates that "Article 36 of the Vienna Consular Convention provides that the host government must notify the arrestee without delay of the arrestee's right to communicate with the American consul." Id. at 378 (emphasis added). That said, and at the risk of stating what is obvious, I believe that the Government's position regarding the restricted application of the Article 36 (of the Vienna Convention) and Article 35 (of the Bilateral Treaty) rights of foreign nationals in the United States not only establishes a repugnant double standard but, considering more practical applications, sets up our many citizens abroad for abuses that we will be hard-put to object to, considering the tenor and outcome of the present appeal. See Gregory Dean Grisvold, Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities, 78 Minn. L.Rev. 771, 792-94 (1994) (hereinafter "Strangers in a Strange Land ").

V. The Background to Article 35

*21 The "legislative history" leading to the Bilateral Treaty with China is sparse. The Senate Report recommending its approval did state, however, that "[t]he bilateral consular convention will complement the multilateral Vienna Convention on Consular Relations of 1963 which is also in force between the two countries, but which treats certain important consular issues in only limited fashion." Sen. Exec. Rep. No. 97-14, 97th Cong., 1st Sess. (1981), at 2. Furthermore, I am astounded by the majority's contention that the Committee's failure to specifically note the individual right of consular notification somehow negates the clear language of Article 35. [FN8] As alluded to above, Article 35 of the Bilateral Treaty is even more emphatic and explicit than Article 36 of the Vienna Convention regarding the individual right of the national to notification of this entitlement by the detaining authority.

VI. The Interpretations of the Enforcement Authorities

Lastly we come upon the views of the enforcing authorities, that is, the ones that on a day to day basis are in the business of detaining and arresting persons, some of which are foreign nationals, and thus are charged with the practical implementation of Article 36 and Article 35. In this respect I should restate my view that once the pertinent treaty is ratified and thus incorporated into municipal law, the State Department should no longer be considered an "enforcing authority." The principal federal governmental entities fitting this description are the Department of Justice and the Immigration and Naturalization Service, [FN9] precisely the two "authorities" directly involved in appellants' detention and arrest. Both have explicit regulations respecting the issue before us, see 28 C.F.R. § 50.5; 8 C.F.R. § 236.1, both of which regulations were ignored with apparent impunity, and now, with judicial blessing, will continue to be transgressed per saecula saeculorum.

The INS regulation specifically requires that "[e]very detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." 8 C.F.R. § 236.1(e) (emphasis supplied). The Department of Justice's regulation also requires that "[i]n every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given." [FN10] 28 C.F.R. § 50.5(1) (emphasis supplied). Notwithstanding these regulations and their conceded violation by the detaining authorities, it appears that the majority is willing to carve out an exception, where aliens are concerned, to the well-established rule which demands of the Government compliance with its own regulations. See, e.g., Fort Stewart Schs. v. FLRA, 495 U.S. 641, 654, 110 S.Ct. 2043, 109 L.Ed.2d 659 (1990) (citing Vitarelli v. Seaton, 359 U.S. 535, 547, 79 S.Ct. 968, 9 L.Ed.2d 1012 (1959), and Service v. Dulles, 354 U.S. 363, 388, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957)).

VII. The Issue of Remedy

*22 Finally, although my principal disagreement with the majority is over the Vienna Convention and the Bilateral Treaty's creation of individual rights, I must also take issue with their treatment of the question of remedy. [FN11] The majority holds that even if appellants have rights under Articles 36 and 35, they are not entitled to suppression of the wrongfully obtained evidence (or dismissal of the indictment) when the government violates those rights. [FN12] I would first say that whenever a court of the United States takes such a position, there is an inevitable erosion of the Judiciary as an institution. It is difficult to harmonize the principle of the rule of law with the granting of governmental immunity from the consequences of its violations of the Law.

The majority's "no remedy" rationale is based entirely on the conclusory assertion that "Article 36 of the Vienna Convention, and the complementary Article 35 of the Bilateral Convention, do not create--explicitly or otherwise--fundamental rights on par with the rights to be free from unreasonable searches, the privileges against self-incrimination, or the right to counsel." I disagree with that conclusion, and I believe that the issue at least deserves a more thorough examination than the cursory treatment afforded is by the majority.

As the majority notes, the exclusionary rule has been reserved for violations of fundamental rights such as those protected by the Fourth, Fifth, and Sixth Amendments. What the majority does not discuss, however, is what makes these rights "fundamental." In my view, we consider these rights fundamental not merely because they appear (along with others) in the Constitution, but because they are essential to the fair and efficient administration of our justice system.

Underlying the Sixth Amendment right to counsel, for instance, is the recognition that the ordinary criminal defendant is unqualified and ill- prepared to navigate the intricacies of our legal system without assistance. As the Supreme Court stated eloquently in Powell v. Alabama, 287 U.S. 45, 68- 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932):

> *23 Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Quoted in Gideon v. Wainwright, 372 U.S. 335, 345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Court has also recognized a right to counsel at the investigatory stage of criminal proceedings, based on the Fifth Amendment's protection against compelled self-incrimination. See Miranda v. Arizona, 384 U.S. 436, 470, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (noting that presence of counsel at interrogations can "mitigate dangers of untrustworthiness" and "help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial").

In my view, the right to consular notification and access responds to the same basic concerns for fairness and efficient administration of justice as does the right to counsel. The appellants in this case, for example, were detained by the United States half a world away from their homes. They spoke no English. They had no relatives or friends in the United States or any of the places where they were detained by U.S. authorities before being brought here. None had ever been to the United States before, and we must assume that none had any understanding of the American legal system. They very likely did not know that they had a right not to incriminate themselves and a right to be represented by counsel, nor even that they had a right to trial by jury. [FN13] In these unfamiliar circumstances, appellants were detained for nearly fifty days without counsel while they were shipped literally around the world, from Bermuda in the Atlantic, to Guantanamo in the Caribbean, to Wake Island and Hawaii in the Pacific, and finally to Boston.

It seems to me, under these circumstances, that consular notification and access are absolutely essential to the fair administration of our criminal justice system. Just as a lawyer guides a criminal defendant through the unknown territory of the justice system, diplomatic officials are often the only familiar face for detained nationals, and the best stewards to help them through the ordeal of criminal prosecution. A consular official offers two things of utmost importance to detained nationals: (1) the familiar background, language, and culture of the alien's homeland, and (2) a familiarity with the criminal system threatening to take away the alien's liberty. Without these aids, I think that we presume too much to think that an alien can present his defense with even a minimum of effectiveness. The result is injury not only to the individual alien, but also to the equity and efficacy of our criminal justice system.

Because I think the rights to consular notification and access incorporated into domestic law by the Senate's ratification of the Vienna Convention and the Bilateral Convention are fundamental to the fair and efficient administration of our justice system, I would hold that the exclusionary rule may be an appropriate remedy, at least where the defendant alien can demonstrate prejudice from the violation of his treaty rights. [FN14]

VIII. Conclusion

*24 In summary: (1) The Vienna Convention and the Bilateral Treaty are self-executing treaties which clearly grant detained individuals rights that are enforceable by them in the courts of the United States; (2) Both the text and "legislative histories" of these treaties, as well as subsequent action of the U.S. authorities support these conclusions; (3) Appellants have established that the authorities violated their rights under Articles 36 of the Vienna Convention and Article 35 of the Bilateral Treaty by failing to notify them of their right to consular assistance; (4) And the exclusionary rule may be an appropriate remedy for violations of these rights.

The contrary decision of this Court is unfortunate not only because it is legally unsupportable, but also because it will harm the credibility of our Nation internationally. Furthermore, it is short-sighted because it will undoubtedly adversely affect the rights of our citizens abroad.

For the reasons stated, I dissent.

FN1. It appears that this issue is only relevant to three of the seven appellants. The notices of appeal filed in this case indicated only that the defendants intended to appeal their sentences and, in the case of those who went to trial, the judgments against them. In their opening appellate briefs, appellants Mao Bing Mo, Sung Li, and Bun Lin explicitly presented arguments regarding their purported rights under the two treaties. The remaining defendants--Hui Lin, Nai Fook Li, Yiu Ming Kwan and Ju Lin-- failed to raise, and therefore forfeited, those arguments. See, e.g., Pignons v. Polaroid Corp., 701 F.2d 1, 3 (1st Cir.1983) (finding arguments not raised in initial appellate brief waived).

FN2. We do not decide whether a federal court could order access to a national denied a meeting with a consular official.

FN3. However, elsewhere in its responses to the court's inquiries, the State Department acknowledged that "[t]he question whether an individual could enforce consular notification obligations in some other way, such as through a mandamus action"--a question we decline to consider here--"is not [one it] has had to address officially." Answers at A-6.

FN4. The United States is not a party to the treaty that formed the IACHR, and is not bound by that court's conclusions. Nonetheless, as a member of the Organization of American States ("OAS"), the United States may participate in the IACHR's advisory proceedings.

FN5. We emphasize that this history casts further doubt on any argument that Article 35(3)'s stray reference to detainees' "rights" conferred fundamental protections of the sort that can be vindicated by suppression of evidence or the dismissal of an indictment. We do not believe that the committee would choose to focus on consular rights and yet neglect to mention the creation of new fundamental rights for criminal defendants if Article 35 in fact created such rights.

FN1. We do not gainsay that, on grounds of policy, there may well be reasons for Congress to give special private rights to foreign detainees above and beyond those conferred upon their American counterparts; the former are likely to enjoy fewer local advantages of language, resources, and friends. But the way remains open to such adjustments through domestic legislation enacted by Congress or, reciprocally, through treaties, negotiated by the State Department and ratified by the Senate, that explicitly provide for private judicial enforcement. No such intended adjustment can be found in the situation at hand.

FN2. The dissent relies on dictum from United States v. Alvarez- Machain, 504 U.S. 655, 667, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992), for the proposition that treaties that are "self-executing" in the usual sense are necessarily enforceable in domestic courts at the behest of affected individuals. In that case, however, the nature of the right being asserted (which arose out of a claimed violation of an extradition treaty) was at least arguably personal, see United States v. Rauscher, 119 U.S. 407, 424, 430-31, 7 S.Ct. 234, 30 L.Ed. 425 (1886); see also United States v. Saccoccia, 58 F.3d 754, 767 n. 6 (1st Cir.1995) (discussing differing views of that issue), so the question of self-execution quite likely would have been decisive if the treaty had in fact been violated. To enlarge the Court's cryptic dictum into a general rule, contrary to the well- established principles discussed above, requires much too great a stretch.

FN1. The chronology of events as to appellants was as follows:
October 2: The M/V Xing Da was intercepted in international waters by the U.S. Coast Guard, and appellants were detained after boarding by Coast Guard personnel.
October 9: Appellants were offloaded in Bermuda and flown to the U.S. Naval Base in Guantanamo, Cuba, where they continued to be held in detention and were interrogated by officers of the U.S. Immigration and Naturalization Service.
October 19: Appellants were transferred to Wake Island and continued in detention.
November 5: A superseding indictment was returned which included appellants.
November 13: Appellants left Wake Island, still under detention.
November 14: Appellants and witnesses arrived in Hawaii.
November 15: Appellants were formally arrested.
November 16: Appellants and witnesses arrived in Boston.
November 18: 93 other passengers and crew were repatriated to China from Wake Island. A final superseding indictment was issued. Appellants had their initial appearance in Boston.
November 20: Appellants were assigned counsel.
At no point during this almost fifty-day ordeal were appellants notified of their right to consular notification and access.

FN2. U.S. Const. art. VI, cl. 2:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FN3. There are, of course, many treaties entered into by the United States regarding which even after Senate ratification, and thus "incorporation" into municipal law, the subject matter is such that individuals lack standing to base claims or defenses in a court of law. See Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C.Cir.1988). But such is not the present case.

FN4. I find the majority's reliance on positions taken by the State Department during litigation to be unpersuasive, particularly as those positions are both self-serving and directly contrary to the Department's nonlitigation position, as I describe above.

FN5. This booklet indicates that the instructions therein are based on legal obligations set forth in the Vienna Convention and bilateral treaties which "are binding on federal, state, and local government officials to the extent that are within such officials' competence", by virtue "Article VI, clause 2 of the Constitution of the United States." Id. at 471.

FN6. Millions of U.S. citizens travel abroad annually. In 1997 17,700,000 traveled to Mexico alone. The Time Almanac 2000, at 354. In that year 476,000 traveled to the People's Republic of China. Id. It is estimated that more than 3,000,000 U.S. citizens live abroad.

FN7. Over 2500 U.S. citizens are arrested abroad annually. See U.S. State Department, Bureau of Consular Affairs, Office of Overseas Citizens Services.

FN8. The committee report devotes barely half a page to its "Section-by- Section Analysis" of the entire Bilateral Treaty--hardly a comprehensive enumeration of the treaty's provisions.

FN9. Although INS is structured within the Department of Justice, it has its own regulation regarding the arrests of aliens. 28 C.F.R. § 50.5(b).

FN10. Some treaties require notification to the consul irrespective of the individual's wishes.

FN11. I would emphasize that the ordinary course of proceedings is for the trial court to make a determination of remedy in the first instance. I think that the majority's side-stepping of the ordinary process in this case to avoid the treaties' clear statement of individual rights is ill- advised, and I would remand the case to the district court to address the issue of remedy if prejudice is first found. However, because the majority hangs its hat on the remedy issue, I will address it briefly.

FN12. Although I interpret the majority opinion to reach only the narrow question of whether these two remedies--suppression and dismissal--are available, particularly in view of the position taken by the concurrence I cannot agree with the majority's conclusion.

FN13. This lack of familiarity is exacerbated when the detained aliens, like appellants, come from countries with vastly different legal and political systems, some of which have little or no recognition of the individual rights that we deem fundamental. See Strangers in a Strange Land, supra.

FN14. I would be more hesitant to sanction the much harsher remedy of dismissal, although I would not rule out such a remedy in extreme cases, such as willful or deceptive denial of consular access.

END OF DOCUMENT

Exhibit 10

GERMAN MINISTRY OF FOREIGN AFFAIRS, NOTE VERBALE OF 29 MARCH 1999 AND ACCOMPANYING LETTER OF 2 FEBRUARY 1999 FROM THE SENATOR FOR JUSTICE AND CONSTITUTIONAL MATTERS OF BREMEN

AUSWÄRTIGES AMT
Gz.: 511-531.41/1226-98 USA

Verbalnote

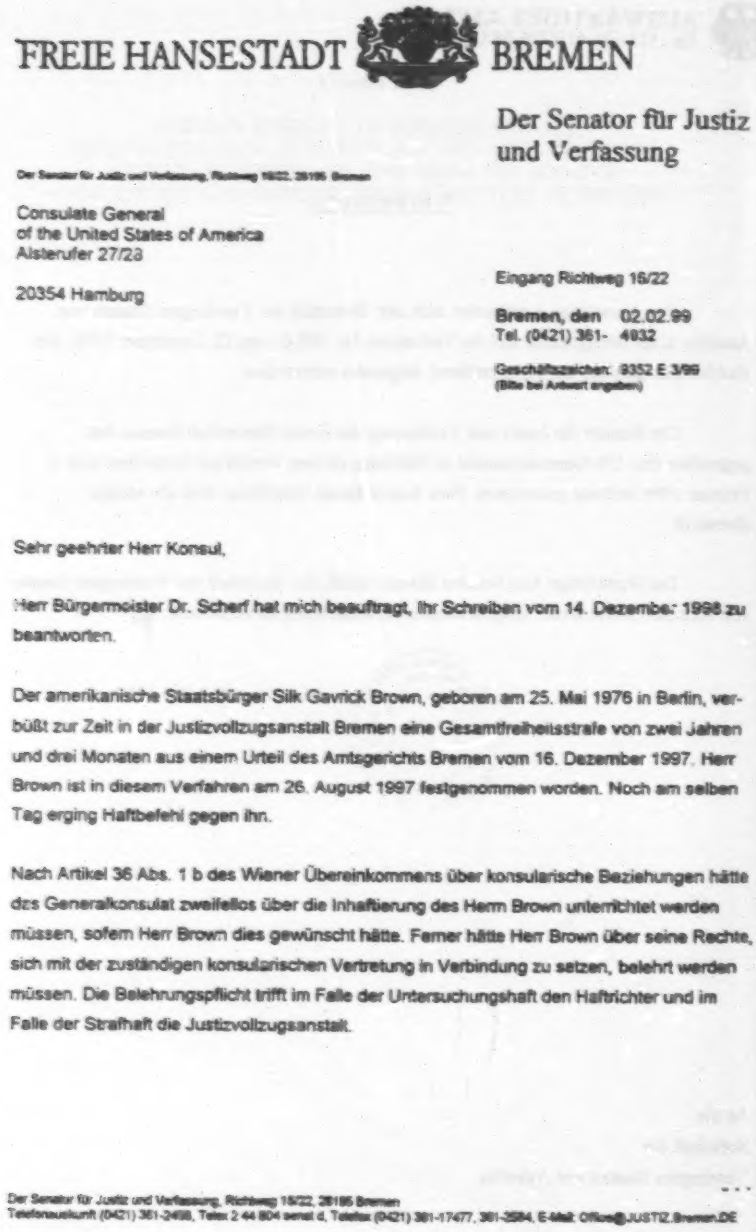
Das Auswärtige Amt beehrt sich, der Botschaft der Vereinigten Staaten von Amerika unter Bezugnahme auf die Verbalnote Nr. 705-C vom 22. Dezember 1998, den Haftfall Silk Gavrick Brown betreffend, folgendes mitzuteilen:

Der Senator für Justiz und Verfassung der Freien Hansestadt Bremen hat gegenüber dem US-Generalkonsulat in Hamburg zu dem Vorfall mit Schreiben vom 2. Februar 1999 Stellung genommen. Eine Kopie dieses Schreibens wird als Anlage übersandt.

Das Auswärtige Amt benutzt diesen Anlaß, die Botschaft der Vereinigten Staaten von Amerika erneut seiner ausgezeichneten Hochachtung zu versichern.

Bonn, den 29. März 1999

An die
Botschaft der
Vereinigten Staaten von Amerika



FREIE HANSESTADT BREMEN

Der Senator für Justiz
und Verfassung

Der Senator für Justiz und Verfassung, Richtweg 16/22, 28195 Bremen

Consulate General
of the United States of America
Alsterufer 27/28

20354 Hamburg

Eingang Richtweg 16/22

Bremen, den 02.02.99
Tel. (0421) 361- 4932

Geschäftszeichen: 9352 E 3/99
(Bitte bei Antwort angeben)

Sehr geehrter Herr Konsul,

Herr Bürgermeister Dr. Scherf hat mich beauftragt, Ihr Schreiben vom 14. Dezember 1998 zu beantworten.

Der amerikanische Staatsbürger Silk Gavrick Brown, geboren am 25. Mai 1976 in Berlin, verbüßt zur Zeit in der Justizvollzugsanstalt Bremen eine Gesamtfreiheitsstrafe von zwei Jahren und drei Monaten aus einem Urteil des Amtsgerichts Bremen vom 16. Dezember 1997. Herr Brown ist in diesem Verfahren am 26. August 1997 festgenommen worden. Noch am selben Tag erging Haftbefehl gegen ihn.

Nach Artikel 36 Abs. 1 b des Wiener Übereinkommens über konsularische Beziehungen hätte das Generalkonsulat zweifellos über die Inhaftierung des Herrn Brown unterrichtet werden müssen, sofern Herr Brown dies gewünscht hätte. Ferner hätte Herr Brown über seine Rechte, sich mit der zuständigen konsularischen Vertretung in Verbindung zu setzen, belehrt werden müssen. Die Belehrungspflicht trifft im Falle der Untersuchungshaft den Haftrichter und im Falle der Strafhaft die Justizvollzugsanstalt.

...

Der Senator für Justiz und Verfassung, Richtweg 16/22, 28195 Bremen
Telefonauskunft (0421) 361-2498, Telex 2 44 804 senat d, Telefax (0421) 361-17477, 361-2584, E-Mail: Office@JUSTIZ.Bremen.DE

Ausweislich des mir vorliegenden Protokolls vom 26. August 1997 über die richterliche Vernehmung und die Verkündung des Haftbefehls hat der zuständige Richter das amerikanische Generalkonsulat nicht von der Verhaftung benachrichtigt. Dies ist laut Protokoll von Herrn Brown auch nicht verlangt worden. Allerdings ist dem Protokoll auch nicht zu entnehmen, ob Herr Brown über sein Recht, die Unterrichtung der konsularischen Vertretung zu verlangen, belehrt worden ist. Der zuständige Richter, hierüber vom Präsidenten des Amtsgerichts Bremen befragt, meint, Herr Brown sei seinerzeit belehrt worden; er , der Richter, könne dies mangels konkreter Erinnerung aber nicht mehr mit letzter Gewissheit sagen. In der Zeit bis zur Hauptverhandlung am 16. Dezember 1997 hat Herr Brown sich mehrfach schriftlich an das Gericht gewandt, ohne dabei den Wunsch nach Unterrichtung des Konsulats zu äußern.

Das Urteil des Amtsgerichts Bremen ist noch am Tag der Hauptverhandlung, also am 16. Dezember 1997, rechtskräftig geworden. Der Sitzungsvertreter der Staatsanwaltschaft hat die sofortige Vollstreckung des Urteils angeordnet. Die Untersuchungshaft ist damit in Strafhaft übergegangen. Mit Wirkung vom 19. Mai 1998 hat die Staatsanwaltschaft die Strafvollstreckung unterbrochen und die weitere Vollstreckung nach den Vorschriften des Betäubungsmittelgesetzes zurückgestellt, weil Herr Brown einen Drogentherapieplatz erhalten hatte. Nachdem Herr Brown die Therapie abgebrochen hatte und in den Verdacht geraten war, erneut straffällig geworden zu sein, widerrief die Staatsanwaltschaft die Zurückstellung der Strafvollstreckung und ordnete die weitere Vollstreckung an. Seither verbüßt Herr Brown die restliche Freiheitsstrafe aus dem Urteil des Amtsgerichts Bremen vom 16. Dezember 1997 in der Justizvollzugsanstalt Bremen.

Ob und wann Herr Brown nach der Übernahme von der Untersuchungshaft in die Strafhaft im Dezember 1997 oder nach seiner erneuten Inhaftierung im August 1998 um Benachrichtigung der konsularischen Vertretung gebeten und über dieses Recht von der Anstalt belehrt worden ist, habe ich ebenfalls leider nicht mit letzter Gewissheit aufklären können. Nach dem mir vorliegenden Bericht der Justizvollzugsanstalt Bremen spricht einiges dafür, dass Herr Brown den Wunsch nach Unterrichtung geäußert hat, die zuständigen Bediensteten dann aber vergessen haben, das Generalkonsulat tatsächlich zu benachrichtigen.

Selbstverständlich darf das Recht ausländischer Inhaftierter, die zuständige konsularische Vertretung zu benachrichtigen, nicht angetastet werden. Dies sehen die Gerichte und die nachgeordneten Behörden meines Geschäftsbereichs nicht anders. Soweit infolge eines Versehens meiner Bediensteten eine gewünschte Benachrichtigung unterblieben sein sollte, bitte ich hierfür in aller Form um Entschuldigung.

Um in Zukunft ähnliche Fälle tunlichst zu vermeiden, ist Verschiedenes veranlasst:

Zunächst ist bei dem Amtsgericht Bremen eine Überarbeitung des für die Vernehmung des Beschuldigten verwendeten Protokollformulars geplant: Dieses soll künftig so klar gestaltet sein, dass im Falle der Verhaftung einer ausländischen Person die vorgesehene Belehrung über das Recht der Benachrichtigung des Konsulats nicht übersehen werden kann.

Die Justizvollzugsanstalt Bremen habe ich aus Anlass des von Ihnen geschilderten Falls gebeten, künftig sorgfältig darauf zu achten, dass alle ausländischen Inhaftierten über ihr Recht belehrt werden, und zwar mittels der dafür in den benötigten Sprachen vorhandenen Formblätter, die - von den Gefangenen unterschrieben - zu den Akten zu nehmen sind.

Mit freundlichen Grüßen

Im Auftrag

Dr. Maul-Backer

DEPARTMENT OF STATE
OFFICE OF LANGUAGE SERVICES
Translating Division

LS No. 03-2000-0108
CT/BL
German

THE MINISTRY OF FOREIGN AFFAIRS
OF THE FEDERAL REPUBLIC OF GERMANY
File No.: 511-531.41/1226-98 USA

Note Verbale

The Ministry of Foreign Affairs has the honor to inform the Embassy of the United States of America of the following with reference to the note verbale No. 705-C of December 22, 1998, concerning the arrest of Silk Gavrick Brown:

The Senator for Justice and Constitutional Matters of the Free Hanseatic City of Bremen commented on this case in a letter dated February 2, 1999 to the U.S. Consulate General in Hamburg. A copy of that letter is enclosed.

The Ministry of Foreign Affairs avails itself of the occasion to renew to the Embassy of the United States of America the assurances of its highest consideration.

[Initial]

Bonn, March 29, 1999

Round stamp of the FM

To the Embassy
of the United States of America

FREE HANSEATIC CITY OF BREMEN
The Senator for Justice and Constitutional Matters
Richtweg 16/22
28195 Bremen

Bremen, February 2, 1999
Tel. (0421) 361-4932

To the Consulate General
of the United States of America
Alsterufer 27/28
20354 Hamburg

Reference: (Please mention in reply): 9352 E 3/99

Dear Sir:

Mayor Dr. Scherf has instructed me to answer your letter of December 14, 1998.

US citizen Silk Gavrick Brown, born on May 25, 1976, in Berlin, is at present serving a total sentence of two years and three months at the Bremen penal institution resulting from a judgment of the District Court of Bremen handed down on December 16, 1997. Mr. Brown was arrested in this connection on August 26, 1997. An arrest warrant was issued for him on that same day.

It is true that in accordance with Art. 36, par. 1 b of the Vienna Convention on Consular Relations, the Consulate General would certainly have had to be informed of Mr. Brown's arrest if Mr. Brown had requested it. Mr. Brown should also have been informed of his right to contact the competent consular mission. In the case of pretrial detention, this obligation to inform the suspect is incumbent upon the judge who issued the arrest warrant, and in the case of a convict serving a sentence, it is the penal institution.

From the transcript of Mr. Brown's questioning by the judge on August 26, 1997, and the proclamation of the arrest warrant, it is clear that the competent judge did not inform the US Consulate General of the arrest. According to the record, Mr. Brown did not request such notification. However, it is not clear from the transcript whether Mr. Brown was informed of his right to request consular notification. The competent judge was asked about this by the chief judge of the District Court and said that he believed that Mr. Brown had been informed at the time of his right to notification, but that he, the judge, could not say so with absolute certainty for lack of specific recollection. In the time leading up to his trial on December 16, 1997, Mr. Brown wrote to the court several times without requesting that the consulate be notified.

The judgment of the Bremen District Court became effective on December 16, 1997, the day of the trial. The prosecutor ordered the immediate execution of the sentence, and the pretrial detention was changed to imprisonment. Effective May 19, 1998, the prosecution interrupted his imprisonment and suspended his sentence under the provisions of the Narcotics Act because he had been accepted in a drug therapy program. After Mr. Brown had dropped out of therapy and was suspected of having relapsed, the prosecution revoked the suspension of his sentence and ordered him to resume serving his time. Since then, Mr. Brown has been serving the rest of his sentence under the judgment of the District Court of Bremen of December 16, 1997 in the Bremen penal institution.

Unfortunately, I have not been able to establish with complete certainty whether and when Mr. Brown asked that the US Consulate be notified of his situation after being transferred from pretrial detention to imprisonment in December 1997, or after his renewed arrest in August 1998, and whether he was informed of this right by the penal authorities. According to the report I have received from the Bremen penal institution there are some indications that Mr. Brown expressed the wish for notification, but that the officers on duty forgot to actually inform the Consulate General.

It is a matter of course that the rights of foreign detainees to have the competent consular mission notified must not be infringed upon. The courts and subordinate authorities of my Department are in complete agreement with this. Should a requested notification have been omitted due to the negligence of my subordinates, I herewith formally offer my apologies.

In order to avoid similar occurrences in the future, we have taken the following measures:

First of all, the District Court of Bremen is planning to revise its forms used in the questioning of suspects. In the future, these form should be drafted in such a clear way that when a foreigner is arrested, the required information on the right to notification of the consulate cannot be overlooked.

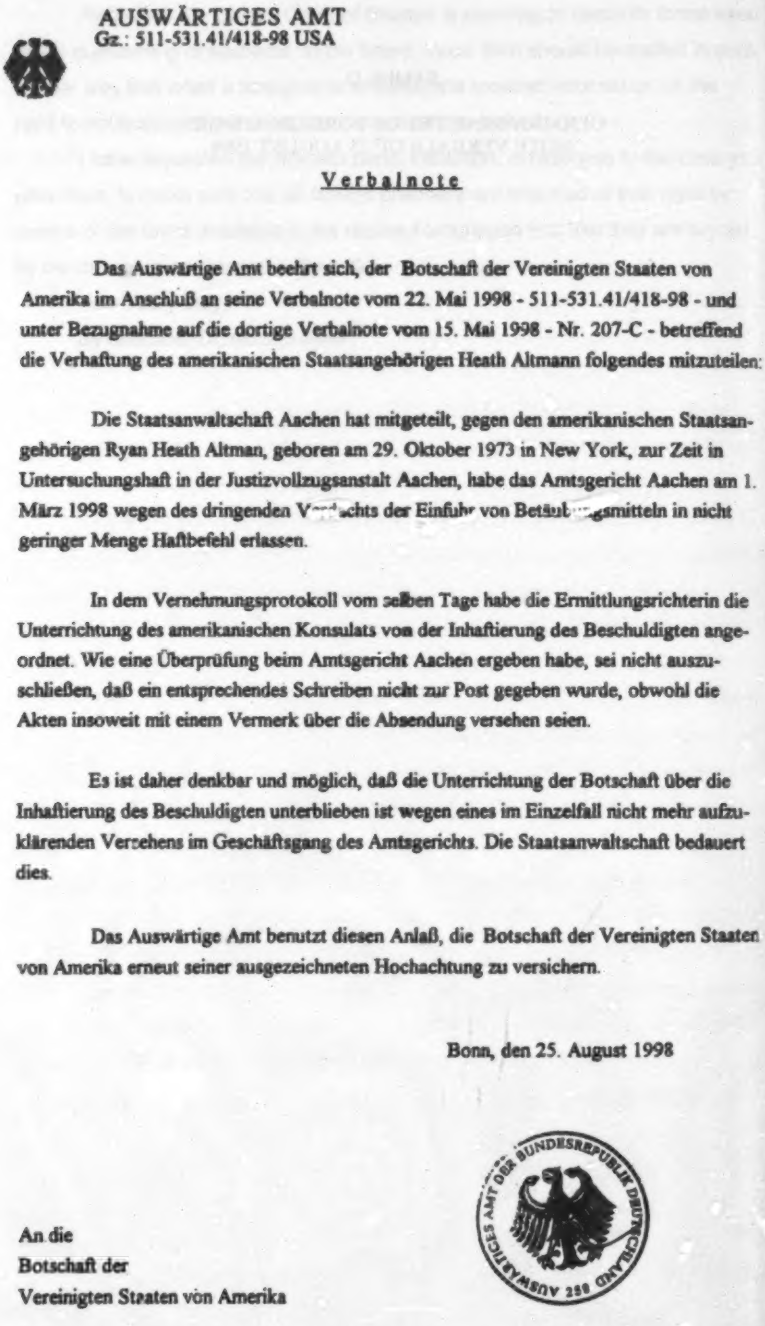
I have requested the Bremen penal institution, in response to the case you described, to make sure that all foreign prisoners are informed of their right by means of the forms available in the required languages and that they are signed by the prisoners and placed in their files.

Yours very truly,

By direction: Dr. Maul-Backer

Exhibit 11

GERMAN MINISTRY OF FOREIGN AFFAIRS, NOTE VERBALE OF 25 AUGUST 1998



AUSWÄRTIGES AMT
Gz.: 511-531.41/418-98 USA

Verbalnote

Das Auswärtige Amt beehrt sich, der Botschaft der Vereinigten Staaten von Amerika im Anschluß an seine Verbalnote vom 22. Mai 1998 - 511-531.41/418-98 - und unter Bezugnahme auf die dortige Verbalnote vom 15. Mai 1998 - Nr. 207-C - betreffend die Verhaftung des amerikanischen Staatsangehörigen Heath Altmann folgendes mitzuteilen:

Die Staatsanwaltschaft Aachen hat mitgeteilt, gegen den amerikanischen Staatsangehörigen Ryan Heath Altman, geboren am 29. Oktober 1973 in New York, zur Zeit in Untersuchungshaft in der Justizvollzugsanstalt Aachen, habe das Amtsgericht Aachen am 1. März 1998 wegen des dringenden Verdachts der Einfuhr von Betäubungsmitteln in nicht geringer Menge Haftbefehl erlassen.

In dem Vernehmungsprotokoll vom selben Tage habe die Ermittlungsrichterin die Unterrichtung des amerikanischen Konsulats von der Inhaftierung des Beschuldigten angeordnet. Wie eine Überprüfung beim Amtsgericht Aachen ergeben habe, sei nicht auszuschließen, daß ein entsprechendes Schreiben nicht zur Post gegeben wurde, obwohl die Akten insoweit mit einem Vermerk über die Absendung versehen seien.

Es ist daher denkbar und möglich, daß die Unterrichtung der Botschaft über die Inhaftierung des Beschuldigten unterblieben ist wegen eines im Einzelfall nicht mehr aufzuklärenden Versehens im Geschäftsgang des Amtsgerichts. Die Staatsanwaltschaft bedauert dies.

Das Auswärtige Amt benutzt diesen Anlaß, die Botschaft der Vereinigten Staaten von Amerika erneut seiner ausgezeichneten Hochachtung zu versichern.

Bonn, den 25. August 1998

250

An die
Botschaft der
Vereinigten Staaten von Amerika

THE MINISTRY OF FOREIGN AFFAIRS
OF THE FEDERAL REPUBLIC OF GERMANY
File No.: 511-531.41/418-98 USA

Note Verbale

The Ministry of Foreign Affairs has the honor to inform the Embassy of the United States of America, with reference to its note verbale of May 22, 1998 (511-531.41/418-98), and to the note verbale of May 15, 1998, No. 207-C concerning the arrest of US citizen Heath Altman, of the following.

The prosecutor's office of Aachen (Aix-la-Chapelle) has informed us that on March 1, 1998, the District Court of Aachen instituted criminal proceedings against Ryan Heath Altman, born on October 29, 1973 in New York, at present in pretrial detention in the penal institution of Aachen on the urgent suspicion of importing narcotics in large amounts.

In the transcript of the questioning on that same day, the investigating judge ordered that the American Consulate be notified of the suspect's arrest. An investigation at the District Court of Aachen has shown that it cannot be excluded that the letter to that effect may not have been mailed, although the files include a note on the mailing.

It is conceivable and possible that the Embassy was not informed of the suspect's arrest due to negligence in the conduct of the business of the District Court the details of which can no longer be clarified. The prosecutor's office regrets this.

The Ministry of Foreign Affairs avails itself of the occasion to renew to the Embassy of the United States of America the assurances of its highest consideration.

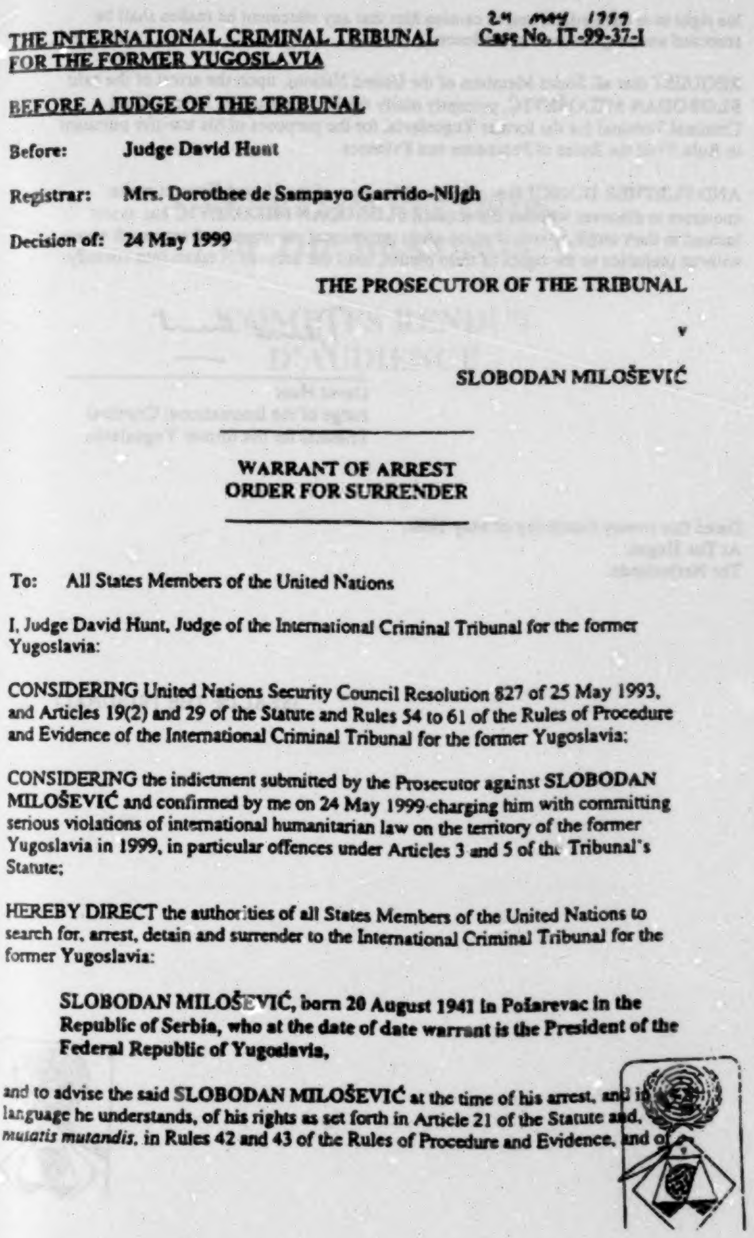
Bonn, August 25, 1998

[Ministry stamp]

To the Embassy
of the United States of America

Exhibit 12

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, WARRANT OF ARREST/ORDER OF SURRENDER,
24 MAY 1999



24 may 1999

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA **Case No. IT-99-37-I**

BEFORE A JUDGE OF THE TRIBUNAL

Before: **Judge David Hunt**

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **24 May 1999**

THE PROSECUTOR OF THE TRIBUNAL

v

SLOBODAN MILOŠEVIĆ

WARRANT OF ARREST
ORDER FOR SURRENDER

To: All States Members of the United Nations

I, Judge David Hunt, Judge of the International Criminal Tribunal for the former Yugoslavia:

CONSIDERING United Nations Security Council Resolution 827 of 25 May 1993, and Articles 19(2) and 29 of the Statute and Rules 54 to 61 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia;

CONSIDERING the indictment submitted by the Prosecutor against **SLOBODAN MILOŠEVIĆ** and confirmed by me on 24 May 1999 charging him with committing serious violations of international humanitarian law on the territory of the former Yugoslavia in 1999, in particular offences under Articles 3 and 5 of the Tribunal's Statute;

HEREBY DIRECT the authorities of all States Members of the United Nations to search for, arrest, detain and surrender to the International Criminal Tribunal for the former Yugoslavia:

> **SLOBODAN MILOŠEVIĆ, born 20 August 1941 in Požarevac in the Republic of Serbia, who at the date of date warrant is the President of the Federal Republic of Yugoslavia,**

and to advise the said **SLOBODAN MILOŠEVIĆ** at the time of his arrest, and in a language he understands, of his rights as set forth in Article 21 of the Statute and, *mutatis mutandis*, in Rules 42 and 43 of the Rules of Procedure and Evidence, and of

his right to remain silent, and to caution him that any statement he makes shall be recorded and may be used in evidence;

REQUEST that all States Members of the United Nations, upon the arrest of the said SLOBODAN MILOŠEVIĆ, promptly notify the Registrar of the International Criminal Tribunal for the former Yugoslavia, for the purposes of his transfer pursuant to Rule 57 of the Rules of Procedure and Evidence.

AND FURTHER DIRECT that all States Members of the United Nations make enquiries to discover whether the accused SLOBODAN MILOŠEVIĆ has assets located in their territory and, if so, to adopt provisional measures to freeze such assets, without prejudice to the rights of third parties, until the accused is taken into custody.

David Hunt

David Hunt
Judge of the International Criminal
Tribunal for the former Yugoslavia

Dated this twenty fourth day of May 1999,
At The Hague,
The Netherlands.

[SEAL OF THE TRIBUNAL]

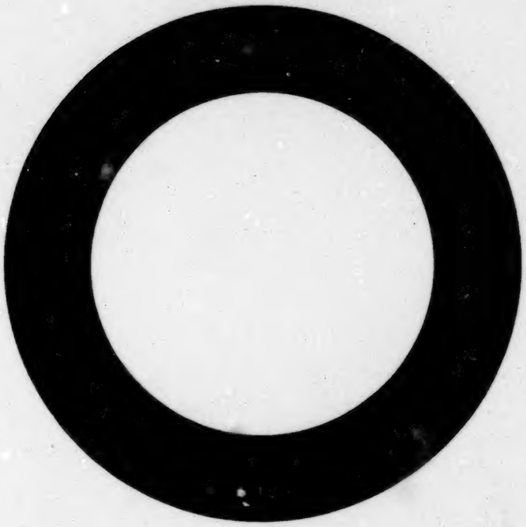
VERBATIM RECORDS
OF THE HEARINGS

COMPTES RENDUS
D'AUDIENCE

[illegible]

[illegible] the United Nations [illegible] SLOBODAN MILOSEVIC [illegible] International Criminal Tribunal for the former Yugoslavia [illegible] Rule 11 of the Rules of Procedure and Evidence.

[illegible]



CR 2000/26

International Court of Justice	**Cour internationale de Justice**
THE HAGUE	**LA HAYE**

YEAR 2000

Public sitting

held on Monday 13 November 2000, at 10 a.m., at the Peace Palace,

President Guillaume presiding

in the LaGrand Case
(Germany v. United States of America)

VERBATIM RECORD

ANNÉE 2000

Audience publique

tenue le lundi 13 novembre 2000, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président

en l'affaire LaGrand
(Allemagne c. Etats Unis d'Amérique)

COMPTE RENDU

Present:	**President**	**Guillaume**
	Vice-President	**Shi**
	Judges	**Oda** **Bedjaoui** **Ranjeva** **Herczegh** **Fleischhauer** **Koroma** **Vereshchetin** **Higgins** **Parra-Aranguren** **Kooijmans** **Rezek** **Al-Khasawneh** **Buergenthal**
	Registrar	**Couvreur**

The Government of the Federal Republic of Germany is represented by:

Mr. Gerhard Westdickenberg, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Eberhard U. B. von Puttkamer, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Bruno Simma, Professor of Public International Law at the University of Munich,

as Co-Agent and Counsel;

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and at the European University Institute in Florence,

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Hans-Peter Kaul, Head of the Public International Law Division, Federal Foreign Office,

Dr. Daniel Khan, University of Munich,

Dr. Andreas Paulus, University of Munich,

as Counsel;

Dr. Eberhard Desch, Federal Ministry of Justice,

Dr. S. Johannes Trommer, Embassy of the Federal Republic of Germany in the Netherlands,

Mr. Andreas Götze, Federal Foreign Office,

as Adviser;

Ms Fiona Sneddon,

as Assistant.

The Government of the United States of America is represented by:

Mr. James H. Thessin, Acting Legal Adviser, United States Department of State,

as Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

as Deputy Agents;

The Honourable Janet Napolitano, Attorney-General, State of Arizona,

Professor Michael J. Matheson, Professor of International Law, School of Advanced International Studies, Johns Hopkins University; former Acting Legal Adviser, United States Department of State,

Professor Theodor Meron, Counsellor on International Law, United States Department of State; Charles L. Denison Professor of International Law, New York University; Associate Member of the Institute of International Law,

Professor Stefan Trechsel, Professor of Criminal Law and Procedure, University of Zurich Faculty of Law,

as Counsel and Advocates;

Professor Shabtai Rosenne, Member of the Israel Bar; Honorary Member of the American Society of International Law; Member of the Institute of International Law,

Ms Norma B. Martens, Assistant Attorney-General, State of Arizona,

Mr. Paul J. McMurdie, Assistant Attorney-General, State of Arizona,

Mr. Robert J. Erickson, Principal Deputy Chief, Appellate Section, Criminal Division, United States Department of Justice,

Mr. Allen S. Weiner, Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

Ms Jessica R. Holmes, Attaché, Office of the Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

as Counsel.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte.

La Cour se réunit aujourd'hui en application des articles 43 à 47 de son Statut pour entendre les Parties en leurs plaidoiries dans l'affaire *LaGrand (République fédérale d'Allemagne c. Etats-Unis d'Amérique)*.

La République fédérale d'Allemagne a porté la présente affaire devant la Cour par une requête introductive d'instance contre le Gouvernement des Etats-Unis d'Amérique déposée au Greffe le 2 mars 1999, en raison de violations alléguées de la convention de Vienne sur les relations consulaires du 24 avril 1963. Dans cette requête, l'Allemagne fait valoir que deux de ses ressortissants, M. Karl LaGrand et M. Walter LaGrand, ont été déclarés coupables de certains crimes et condamnés à mort dans l'Etat de l'Arizona aux Etats-Unis d'Amérique sans avoir été informés des droits à l'assistance consulaire que leur garantissait l'alinéa *b)* du paragraphe premier de l'article 36 de la convention de Vienne sur les relations consulaires. La République fédérale d'Allemagne soutenait que les Etats-Unis d'Amérique avaient par là même violé plusieurs obligations découlant du droit international.

Pour fonder la compétence de la Cour, l'Allemagne invoquait, dans sa requête, l'article premier du protocole de signature facultative concernant le règlement obligatoire des différends, qui accompagne la convention de Vienne sur les relations consulaires. Cet article est ainsi libellé : «Les différends relatifs à l'interprétation ou à l'application de la convention relèvent de la compétence obligatoire de la Cour internationale de Justice, qui, à ce titre, pourra être saisie par une requête de toute partie au différend qui sera elle-même partie au présent protocole.» Et l'Allemagne de préciser que tant les Etats-Unis qu'elle-même étaient parties à la convention de Vienne et audit protocole de signature facultative.

Le jour même du dépôt de sa requête introductive d'instance, l'Allemagne a également déposé une demande en indication de mesures conservatoires au titre de l'article 41 du Statut de la Cour. Dans sa demande, elle indiquait que Karl LaGrand avait été exécuté le 24 février 1999 et que la date de l'exécution de Walter LaGrand avait été fixée au lendemain de la demande, à savoir le 3 mars 1999. Compte tenu de l'extrême urgence et du fait que l'exécution de Walter LaGrand aurait porté un préjudice irréparable aux droits revendiqués par l'Allemagne au cas particulier, la

Cour a rendu le 3 mars 1999 une ordonnance indiquant des mesures conservatoires conformément à l'article 41 de son Statut et au paragraphe premier de l'article 75 de son Règlement. Aux termes de cette ordonnance, les Etats-Unis d'Amérique devaient prendre toutes les mesures dont ils disposaient pour que M. Walter LaGrand ne soit pas exécuté tant que la décision définitive en la présente instance n'aurait pas été rendue, et devaient porter à la connaissance de la Cour toutes les mesures qui auraient été prises en application de ladite ordonnance.

Par lettre du 8 mars 1999, l'ambassade des Etats-Unis d'Amérique a informé la Cour des mesures prises relativement à cette ordonnance. La lettre précisait, entre autre, qu'une copie de l'ordonnance de la Cour avait été transmise par le département d'Etat au gouverneur de l'Arizona le jour même où celle-ci l'avait rendue; que, compte tenu de l'heure extrêmement tardive à laquelle l'ordonnance de la Cour avait été reçue, aucune autre démarche n'avait pu être entreprise; et que, dans la soirée du 3 mars 1999, M. Walter LaGrand avait été exécuté.

Par ordonnance du 5 mars 1999, des délais pour le dépôt d'un mémoire de la République fédérale d'Allemagne et d'un contre-mémoire des Etats-Unis d'Amérique ont été fixés; ces documents ont été dûment déposés dans les délais prescrits. A la suite du dépôt de ces pièces, le président de la Cour a rencontré les agents des Parties en application de l'article 31 du Règlement de la Cour, afin de s'informer de leurs vues concernant les questions de procédure en l'espèce; l'Allemagne a indiqué, au cours de cette réunion, qu'elle ne souhaitait pas produire de pièce de procédure additionnelle et les Etats-Unis ont ajouté qu'il en était dès lors de même en ce qui les concerne. L'affaire s'est donc trouvée en état et les dates de la procédure orale ont été fixées, la Cour ayant consulté les Parties sur l'organisation de cette procédure.

*

Par lettre reçue au Greffe le 26 octobre 2000, l'agent de l'Allemagne a exprimé le vœu de son gouvernement de produire cinq documents nouveaux conformément aux dispositions de l'article 56 du Règlement de la Cour. Copie de cette lettre et des documents qui y étaient joints a été communiquée à l'autre Partie, pour lui permettre de formuler toutes observations qu'elle eût souhaité faire en vertu du paragraphe premier de l'article 56 du Règlement de la Cour. Par lettre du 6 novembre 2000, l'agent des Etats-Unis d'Amérique a fait savoir à la Cour que les Etats-Unis acceptaient la production des premier et deuxième documents, mais non celle des troisième, quatrième et cinquième documents; dans cette lettre les Etats-Unis d'Amérique ont réservé leur droit à soumettre un ou plusieurs documents en rapport avec les documents nouveaux produits par l'Allemagne, conformément au paragraphe 3 de l'article 56 du Règlement de la Cour. Dans une lettre datée du 7 novembre 2000, l'agent de l'Allemagne a formulé des observations sur cette lettre de l'agent des Etats-Unis d'Amérique, auxquelles celui-ci a réagi dans une nouvelle lettre également datée du 7 novembre 2000.

En l'absence d'objection de la part des Etats-Unis d'Amérique, la Cour n'avait pas, conformément au paragraphe 1 de l'article 56 du Règlement, à autoriser formellement la production des premier et deuxième documents. En ce qui concerne les troisième, quatrième et cinquième documents, la Cour a décidé, en application du paragraphe 2 de l'article 56 de son Règlement, d'autoriser leur production par l'Allemagne, étant entendu que les Etats-Unis d'Amérique auraient, conformément au paragraphe 3 de l'article 56 du Règlement, la possibilité de présenter ultérieurement des observations à ce sujet et de soumettre des documents à l'appui de ces observations. Cette décision a été dûment communiquée aux Parties par lettres du Greffier en date du 9 novembre 2000. En outre, je souhaiterais à présent préciser que, l'Allemagne n'ayant fait connaître que très tard son souhait de produire des documents nouveaux, les Etats-Unis d'Amérique pourront, s'ils le désirent, soumettre leurs nouveaux documents ainsi que leurs observations à cet égard non seulement lors de la procédure orale mais encore après la clôture de celle-ci, par écrit.

*

Après s'être renseignée auprès des Parties, la Cour a enfin décidé, conformément aux dispositions du paragraphe 2 de l'article 53 de son Règlement, que des exemplaires des pièces de procédure et des documents annexés seront rendus accessibles au public à compter de ce jour. En outre, conformément à la pratique de la Cour, les pièces de procédure sans leurs annexes figureront

dès aujourd'hui sur le site Internet de la Cour et seront ultérieurement publiées dans la *Série Mémoires, plaidoiries et documents* de la Cour.

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Je constate la présence dans la salle des agents et des conseils des Parties. Conformément à l'usage, la République fédérale d'Allemagne, en sa qualité de demandeur, sera entendue la première. Je vais donc maintenant donner la parole à M. Westdickenberg, agent de l'Allemagne.

Monsieur l'agent vous avez la parole.

Mr. WESTDICKENBERG:

I. INTRODUCTORY STATEMENT

1. Mr. President, distinguished Members of the Court, as Legal Adviser of the German Federal Foreign Office it is an honour for me to appear before you once again. Please permit me to introduce my colleagues who will argue this case together with me:

- Prof. Bruno Simma of the University of Munich as Co-Agent, and — as counsel —
- Prof. Pierre-Marie Dupuy of the University of Paris-Assas,
- Donald Donovan, from the law firm Debevoise and Plimpton,
- Hans-Peter Kaul, Head of the Division for Public International Law at the German Foreign Office,
- Dr. Daniel Khan and Dr. Andreas Paulus, assistants to Prof. Simma at the University of Munich.

2. The case before us today is special in many ways:

- First, it has arisen between two States which are close allies and partners; their peoples are bound in friendship; their peoples and governments share mutual values.
- Second, it deals with legal proceedings that led to the death of two men, the German nationals Karl and Walter LaGrand, the first executed by way of lethal injection, the second in the gas chamber in the State of Arizona. However, it is not the fact of their death — as sad and

regrettable as this is and as much as it is today on the mind of my colleagues and myself — that is at the centre of this law suit. Nor is our Application directed against the practice of capital punishment as such, even though its consequences clearly have a significant impact on the legal matters we are dealing with today.

— Third, this case is the first case in which this Court has issued an Order on its own motion, pursuant to Article 75, paragraph 1, of its Rules. Acting literally within hours after it had been seised by Germany on 2 March 1999, the Court decided on provisional measures, without having held a hearing, for one essential reason: the life of a man was in imminent danger.

3. All this demonstrates that this case concerns high principles: why else should Germany feel forced to sue its close ally, the United States? Why else should the Court feel the necessity to act in such an unprecedented manner? We are here today to obtain the decision of the World Court on legal issues of great significance. No longer of great significance, unfortunately, for the LaGrand brothers, but of great significance for consular relations and thus for individuals but also States worldwide — not just Germany. We are dealing with questions of international law: nothing more, but also nothing less! I am emphasizing this because some observers might be tempted to neglect precisely this point. This is not a criminal trial. Germany is not accusing anyone, least of all the US Administration. As Applicants we are seeking a judgment of the International Court of Justice on matters concerning the Vienna Convention on Consular Relations and the United States is the Respondent. Stressing the international legal aspects — as Germany does — should not be mistaken for a lack of empathy either with the victims of the crimes committed by Karl and Walter LaGrand or with the destiny of the two brothers. This emphasis is rather based on respect for the high principles and tasks guiding this Court, which is not an appellate criminal court, but, as follows from the Optional Protocol to the Vienna Convention, the guardian of the latter's observation and practice.

4. Let me make it perfectly clear: Germany does not want to do harm in any way to its relations with the United States; these relations are excellent and shall stay that way. The very fact that the United States and Germany can litigate before the International Court of Justice without prejudice to their relations is evidence of how good and close those relations are and of the existence of a highly developed legal culture in both countries. Both are committed to the rule of

law, domestically and internationally. Let me add that the Court has decided in a good dozen cases between allied nations.

5. On the international plane, the Vienna Convention is an important pillar for the protection of each country's nationals and their rights abroad. We would like to emphasize here, as we already did in our Memorial[1], that it is not just Germany but also the United States, with more than 4 million of its nationals abroad all around the world, which has a vital interest in this Court being given the opportunity to pronounce itself on the interpretation of one of the key norms of the Vienna Convention. This will increase certainty in the law and is in the interest of both States, because a judgment of the Court will enhance the application of the Vienna Convention and contribute to the protection of our citizens. This view seems to be shared by the United States. To quote the US State Department: "We fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard . . . It is entirely appropriate to raise [such cases] with us."[2]

6. As I have already said and as we have emphasized in our Memorial[3], the present case is not about the death penalty in general or its application in any particular country. However, Germany's stance on capital punishment is clear: together with its EU partners, Germany has for many years been working towards its abolition worldwide. The Federal Government and the German Bundestag both view the death penalty as an infringement of the fundamental human right to life. We are of the opinion that this form of punishment cannot be justified, neither ethically nor legally. Nor do we believe that it has proven to be a viable method of crime control.

7. Nonetheless, it is up to the States in their sovereign capacity to decide whether to permit or abolish the death penalty within their jurisdiction. Under international law there is no obligation to abolish the death penalty. What we do see, however, is a global trend towards its abolition. More than half of all States in the world have abolished capital punishment either *de facto* or *de jure*. Germany played a major role in initiating the Second Optional Protocol to the International

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[1] Memorial, para. 1.07.

[2] New York Times, 30 October 2000, page A 20.

[3] Memorial, para. 1.08.

Covenant on Civil and Political Rights on the abolition of the death penalty, which has now entered into force in 42 States. As I said, the death penalty as such may not be contrary to international law. But the limits codified in Article 6 of the Covenant must be respected.

8. In the 41 member States of the Council of Europe the death penalty has *de facto* been abolished, and, following Protocol No. 6 to the European Convention on Human Rights, almost all of them have now also abolished it *de jure*. Countries wishing to accede to the Council of Europe, in which the United States has observer status, are obliged to ratify Protocol No. 6.

9. Mr. President, distinguished Members of the Court, at this point I would like to emphasize again that we do not question the crimes committed by the LaGrand brothers. We deeply deplore the great suffering they inflicted on the victims and those left behind. However, we are also aware of the importance of consular protection for the rights of German and American citizens abroad, especially when irreversible decisions such as the imposition and execution of the death penalty are at stance. This is why we are seeking clarification of the obligations of States parties arising under Article 36 of the Vienna Convention. We are doing so not only for the sake of the citizens of our two countries, but for the benefit of human beings worldwide.

10. It has been no easy decision for us to take the case of the LaGrand brothers to the International Court of Justice. For us, it was a means of last resort after all other avenues had been tried in vain. After the German authorities had been informed of the case in 1992 by the brothers themselves, our efforts to come to their assistance first focused on the ongoing domestic judicial proceedings out of respect for the independence of the judiciary. In the course of these proceedings, Karl and Walter LaGrand addressed the violation of the Vienna Convention, but to no avail. Only after all domestic legal remedies had been exhausted at the end of 1998, after the US Supreme Court had denied *certiorari*, and the dates of execution had been fixed by the Arizona Supreme Court on 12 January 1999, only then did Germany ask for clemency. Diplomatic steps were pursued at all political levels and included letters from the Federal Minister for Foreign Affairs and the Minister of Justice to their US counterparts, various approaches made to the Governor of the State of Arizona, and even letters from the Federal President and the Federal Chancellor to President Clinton. At first, all these diplomatic efforts relied on political and moral appeals to obtain clemency. The granting of such clemency would have distinctly diminished the

consequences of the violations of the Vienna Convention by the United States. It would have prevented the first execution of a German citizen in the United States since the founding of the Federal Republic of Germany, back in 1949.

11. We initially limited ourselves to these diplomatic appeals and did not bring the case to the International Court of Justice for two main reasons: firstly, we trusted that the US courts would remedy the violations of the Vienna Convention raised by the LaGrand brothers, and secondly, we expected clemency to be granted.

12. When the Arizona Board of Executive Clemency, in its hearing on 23 February 1999, rejected the petitions of Karl LaGrand, it became clear, however, that clemency could not be expected. During that hearing the German Government learned for the first time that the authorities of the State of Arizona had been aware of the German nationality of the LaGrand brothers from the very beginning and had thus grossly neglected their duty to inform the brothers about their rights under the Vienna Convention. It was then that Germany decided to bring the case before the International Court of Justice.

13. We acknowledge that the Court acted so speedily and indicated in its Order on Provisional Measures of 3 March 1999 that the execution of Walter LaGrand should be stayed until the Court reached its final decision. Regrettably, Walter LaGrand was executed in spite of this Order.

14. Germany has a further reason to appear before this Court. We hope that its judgment will also confirm what in our view is of the greatest importance to the dealings of this Court, namely that an Order for Provisional Measures issued under these circumstances is binding. Only when this principle is upheld is it possible to prevent that decisions of the Court on substance are rendered meaningless by the intervening action of a party prior to the final decision. We also feel the necessity to continue with the case because, following the execution of the LaGrand brothers, we believe that there is ample proof of continued and widespread failure by the United States authorities to live up to the international obligations under Article 36 of the Vienna Convention. Despite all efforts by the US authorities — efforts which we expressly acknowledge — to improve the observance of the obligation to notification pursuant to Article 36 of the Vienna Convention, right while I speak, German nationals who have been deprived of their consular rights are held in

US jails. We know of at least 24 cases in which German nationals have been arrested without being informed of their rights under Article 36 which occurred in 1998 or thereafter, that is, since the United States began to take steps to improve observance of Article 36. Thus, a case like that of the LaGrands could happen any time again.

15. This state of affairs is of great significance not just for Germans, but for all foreign nationals arrested in the United States, and could have particularly tragic consequences in cases in which, like in ours, the death penalty may be imposed. According to *Amnesty International*, in June 2000 there were no less than 87 foreign nationals condemned to death in US prisons. Since 1993, 14 foreign nationals have been executed in the United States: in no less than 11 of these cases violations of Article 36 of the Vienna Convention were asserted[4]. I would like to mention in this context the names of Francisco Angel Breard, the Paraguayan citizen executed in April 1998, whose case was heard by this Court, and the Canadian citizen Joseph Stanley Faulder executed in June of last year and the Mexican Miguel Angel Flores who was put to death in Texas four days ago.

We hope that these proceedings will lead to important clarifications and will strengthen the role of the Vienna Convention on Consular Relations and thus the protection of people worldwide.

16. Monsieur le président, Madame et Messieurs les juges, permettez-moi de vous indiquer comment et dans quel ordre la délégation allemande abordera les différentes questions débattues à la présente audience.

17. Le professeur Bruno Simma commencera par exposer les éléments fondamentaux de l'affaire avant de commenter certaines divergences dans l'interprétation de ces faits par les Parties.

Viendra ensuite M. Daniel Khan qui traitera des questions de compétence et de recevabilité soulevées dans le contre-mémoire des Etats-Unis.

Il sera suivi de M. Hans-Peter Kaul qui analysera les violations aux termes du paragraphe 1 de l'article 36 de la convention de Vienne sur les relations consulaires, commises dans l'affaire *LaGrand*.

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[4] Amnesty International, Key Topics, Execution of Foreign Nationals by the USA as of 23 June 2000, available at http://www.amnestyusa.org/abolition/fnnat.html.

Puis M. Andreas Paulus fera valoir qu'en appliquant leur loi nationale les Etats-Unis ont également violé le paragraphe 2 de l'article 36 de la convention de Vienne.

Le professeur Simma reprendra la parole pour démontrer que le droit à l'information prévu par l'article 36 de la convention de Vienne constitue un droit individuel et que ce droit a caractère de droit de la personne humaine en tant que garantie de procédure spécifique impérative dans les affaires de peine de mort.

L'après-midi, M. Donovan commencera par répondre à l'allégation du défendeur selon laquelle l'Allemagne n'est pas parvenue à démontrer que les violations reconnues de la convention de Vienne dans l'affaire *LaGrand* ont eu des conséquences négatives.

Le professeur Simma reviendra ensuite sur la question de la responsabilité des Etats-Unis concernant les violations de la convention de Vienne, faisant valoir en particulier que cela donne à l'Allemagne non seulement le droit à une déclaration de la Cour relative à ces violations mais aussi le droit d'obtenir des assurances et des garanties de non-répétition.

Pour finir, le professeur Pierre-Marie Dupuy traitera de manière exhaustive de toutes les questions intéressant l'ordonnance de la Cour en date du 3 mars 1999 et sa non-observation par les Etats-Unis.

18. Compte tenu de la complexité de cette affaire et du peu de temps qui nous est imparti aujourd'hui, l'Allemagne invite la Cour à se reporter aux pièces de procédure écrites pour toute question qui pourrait ne pas être traitée à la présente audience.

19. Avec l'autorisation de la Cour, nous éviterons durant cette procédure orale de donner les références des citations auxquelles nous recourrons. Ces références sont indiquées dans les copies communiquées au Greffe.

20. Nous avons également remis à la Cour les dossiers des juges contenant certaines pièces fondamentales parmi lesquelles se trouvent les conclusions soumises à la Cour dont le texte a subi certains aménagements.

21. Monsieur le président, Madame et Messieurs les juges, je vous remercie pour votre attention durant mon introduction et je vous prie de bien vouloir donner la parole au professeur Bruno Simma pour qu'il poursuive l'exposé de l'Allemagne. Merci beaucoup.

Le PRESIDENT : Je vous remercie Monsieur Westdickenberg et je donne maintenant la parole au professeur M. Bruno Simma.

M. SIMMA: Merci, Monsieur le président.

II. THE FACTS OF THE CASE

1. Mr. President, distinguished Members of the Court, it is a great honour to appear before you again, this time representing my own country in a case which is of utmost importance to Germany. My first task today is to review the facts of the case. Germany notes with satisfaction that most of these facts are virtually undisputed. I will start my presentation by briefly recalling this common ground.

2. In January 1982 the two German nationals Karl and Walter LaGrand attempted an armed bank robbery in Marana/Arizona, in the course of which the bank manager was murdered and another bank employee seriously injured. Upon the arrest of the brothers, the Arizona authorities did not inform them about their rights under Article 36 of the Vienna Convention on Consular Relations. Neither did the authorities notify the arrest and detention of the LaGrands to the German Consulate. The LaGrands themselves were not aware of their rights to consular advice. In Annex 2 to our Memorial you will find the Presentence Reports which prove that Arizona authorities had known of the German citizenship of the two brothers since April 1982 at the latest. Ten years later, in June 1992, German consular officers were made aware of the case by the LaGrand brothers themselves. They had learnt of their rights from two other German prison inmates, and not from the Arizona authorities. At that time Karl and Walter LaGrand had already been tried and sentenced to death. In the criminal proceedings leading to these sentences the lack of consular advice had not been raised by the brothers' attorneys or anybody else. When finally put forward much later in the *habeas corpus* proceedings, their claim of violation of Article 36 was considered to be procedurally defaulted. Claims regarding the inadequate performance of earlier counsel, especially in the case of Karl LaGrand, and other shortcomings of the proceedings at the State level met a similar fate. Thus, due to the lack of timely consular notification and the subsequent application of the doctrine of procedural default, Germany was unable to assist the brothers in their legal efforts effectively. Despite all imaginable efforts made on the judicial as

well as at the consular, diplomatic, and finally, the political plane, Karl and Walter LaGrand were executed in February and March 1999. Walter LaGrand's execution took place after this Court had issued an Order on 3 March indicating, *inter alia*, that "[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings"[5]. What US authorities did immediately after the issuance of this Order was the following: first, the State Department transmitted the Order to the Governor of Arizona without any comment; second, the Solicitor General argued before the United States Supreme Court that "an order of the International Court of Justice indicating provisional measures is not binding"[6]; third, the US Supreme Court delivered the judgment which adopted this view[7]; fourth, the Governor of Arizona decided not to use her discretionary power to stay the execution in spite of a recommendation to this effect by the Arizona Board of Executive Clemency; and finally, Arizona officials executed Walter LaGrand in disregard of the Order of the Court. Mr. President, Members of the Court, these are the essential facts of the case.

3. Although — as the Respondent rightly points out — "the facts of this case are less complex and less contested than those in other cases now before the Court"[8], Part II of the United States Counter-Memorial shows that certain differences do exist. Let me begin with some minor points.

4. The Respondent concludes from letters of the German President and the German Minister of Justice to their United States counterparts written in the weeks before the executions[9] that Germany had acknowledged that the brothers had received a fair trial. It is true that President Herzog's letter of 5 February 1999 did not express doubts as to "the legitimacy of the conviction nor the fairness of the procedure"[10]. But, Mr. President, Members of the Court, President Herzog's letter was clearly a plea for clemency and not a legal brief. It served a purpose different from that of taking a position on a complex legal issue, and it was certainly not aimed at

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[5] Order of 3 March 1999, *I.C.J. Reports 1999*, p. 16.

[6] See Memorial, Ann. 28.

[7] See Memorial, Ann. 32.

[8] Counter-Memorial, para. 13.

[9] See Memorial, Anns. 14 and 20.

[10] Counter-Memorial, para. 14.

evaluating the lawfulness of the conduct of the United States under international law. This issue was raised in a letter written by German Foreign Minister Fischer on 22 February 1999[11] — a fact not mentioned by the Respondent. Let me add that Germany does not intend, within the present proceedings, to raise any questions concerning the legitimacy of the convictions or the fairness of the procedure under the law of the United States. We are before the highest international court and our claims relate exclusively to international law. What Germany requests is a judgment of this Court declaring that actions and omissions of organs of the United States violated certain rules of international law and specifying appropriate international legal remedies.

5. The Parties further agree on the circumstances of the LaGrands' birth, their extremely difficult childhood, partly spent in foster care both in Germany and the United States, and their difficult and troubled lives as teenagers. Finally, there is no disagreement that Karl and Walter LaGrand were German nationals from birth to death and never acquired any other nationality. However, what the United States does attempt is to minimize the relevance of nationality for the present case. The Counter-Memorial says that at the time of the murder in early 1982:

> "the brothers appeared in all respects to be native citizens of the United States . . . [by] their appearance, mannerisms, and characteristics . . . [and] were fully American in outlook"[12].

We ask ourselves what the United States wants to demonstrate with this description. It certainly cannot call into question the fundamental principle of international law, confirmed by a settled practice of this Court, according to which nationality is a legal bond based on certain social factors. The Respondent does not contest that descent from a German mother constitutes such a legitimate link. Neither can the so-called American "appearance" and "characteristics" serve as an excuse for US non-compliance with the obligation to inform the brothers of their rights to contact the German Consulate. Upon their detention, Karl and Walter LaGrand had filled in an Arrest Information Sheet indicating that their place of birth had been Germany. You will find the relevant form for Karl LaGrand in Annex 1 of the German Memorial. It is therefore surprising, to put it mildly, that the responsible officials, in a country whose nationality laws are based on the principle of *ius soli*, might have mistaken the LaGrand brothers as "native citizens of the United States"[13]. I have also mentioned already that the Presentence Reports stated explicitly that Karl and Walter LaGrand were German nationals. Finally, before the Board of Executive Clemency on 23 February 1999, Arizona State Attorney Peasley admitted in no uncertain terms that the Arizona authorities had been aware of the German nationality of the brothers from the very beginning.

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[11] See Memorial, Ann. 18.

[12] Counter-Memorial, paras. 16, 17.

6. The United States further emphasizes the multiplicity of appellate proceedings in the case of the brothers. Again, we wonder what the intention behind this might be. Is such a reference aimed at convincing the Court that, due to the quality and quantity of the proceedings within the judicial system of the United States, justice had been done and that therefore no interference by this Court is necessary? This would totally distort the purpose of the German Application: Germany does not in the least intend to place the International Court in a line with the numerous US courts that dealt with this case. Germany brings before the Court nothing but questions related, and confined, to the interpretation and application of certain rules of international law in a specific case. Both Parties have accepted as binding the Optional Protocol to the Vienna Convention, according to Article I of which: "[d]isputes arising out of the interpretation and application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice". Further, it is of no relevance in our context that, to quote the Counter-Memorial, "appropriate judicial authorities determined that the LaGrands' defence lawyers had provided a constitutionally sufficient level of representation"[14]. This is simply not at issue here. What we claim is that, due to the omission of notification, Germany was deprived of its right under the Vienna Convention to assist the brothers in obtaining adequate legal assistance. That the so-called "constitutionally sufficient level of representation" was far from adequate is an entirely different problem.

7. Let me now make a few observations relating to Chapter III of Part II of the Counter-Memorial entitled "Efforts by the United States to improve compliance"[15]. In this chapter, the United States gives an account of various steps undertaken in order to improve domestic compliance with the notification requirements of the Vienna Convention. I regret to say that this is

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[13] Counter-Memorial, para. 16.

[14] Counter-Memorial, para. 19.

[15] Counter-Memorial, paras. 20 *et seq.*

not the first time that counsel for the United States reports about such efforts to this Court. More than two and a half years ago, in her oral statement on 7 April 7 1998 in the *Breard* case, Ms Brown, counsel for the United States, said among other things:

> "[T]he United States has also intensified its long-standing efforts to ensure that all federal, state, and local law enforcement officials in the United States are aware of and comply with the consular notification and access requirements of Article 36. Guidance on these requirements has been issued regularly by the Department of State for many years."[16]

And after listing and specifying recent efforts in this regard, Ms Brown concluded:

> "Through these and other efforts, the United States is both acting to correct the circumstances that led to the failure of consular notification in Mr. Breard's case and acting in a manner consistent with state practice. Nothing more is required."[17]

I repeat, "Nothing more is required."

8. Mr. President, Members of the Court, it is impossible not to see the parallel between this statement and that in the Counter-Memorial in the present case. I am sure that tomorrow our American colleagues will once again describe these various efforts. Of course Germany welcomes each and every measure taken in this regard. However, what ultimately counts are positive results, in other words, compliance. And here I am sorry to say that we are still very far away from satisfactory results. If one looks at the list of cases involving German citizens most recently detained in violation of Article 36 — a list that you will find in your folder — one must conclude that the efforts mentioned by the Respondent have not achieved anything resembling regular observance. What we do see is a continuing pattern of neglect of Article 36 by US law enforcement authorities. Our list is, by the way, far from comprehensive. First, it only includes cases of persons arrested after 1 January 1998, that is since the United States, according to its own testimony, stepped up its efforts to comply with the notification requirements. And second, our list can, of course, only cover those cases in which German officials somehow received notice of the arrest and detention. In other words, we can be sure that there is a considerable number of cases yet unknown. A rough estimate by our Consulates in the United States led to the conclusion that at present, despite the efforts described by the Respondent, less than 25 per cent of all German

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[16] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures,* Pleadings, CR 98/7, 7 April 1998, para. 2.27.

[17] *Ibid.*

citizens arrested in the United States have been duly informed of their rights under the Vienna Convention. And, as I said, this estimate cannot take into account the undetected breaches. Still concerning the list before you, I would like to draw your attention to three specific points.

9. First, as evidenced by case No. 1 on that list, even in potential capital cases law enforcement authorities still appear insufficiently sensitized to the notification requirement under the Vienna Convention.

10. Second, if we concentrate for a moment on the examples from California, we consider it alarming that not even repeated protests on behalf of Germany have succeeded in changing the practice of disregard for Article 36. In a letter of 7 July 1999 to the Governor of California, Germany protested against non-notification in the case of Katharina Grant (this was case No. 14). This letter remained without response. Nor did the Governor appear to take any steps to improve compliance by the California authorities with the notification obligation. If he had done so, it would not have been necessary for Germany to protest time and again in similar instances. Let me just mention our letters dated 2 March, 23 June, 27 July and 29 August of this year (I refer to cases Nos. 7, 9, 2 and 10 in the list). The Californian response in the case of Nils Himmelsbacher (case No. 7) openly admits that the reason for the failure to notify Mr. Himmelsbacher was probably that the authorities were simply ignorant of the rights and duties arising under the Consular Convention. A pattern of neglect for Article 36 such as that appearing in California is less surprising, of course, if one reads the communication of the Californian Attorney-General in the case of the German national Udo Mardis dated 13 September of this year (case No. 2 on the list). A copy of this letter has been submitted to the Court. The letter says among other things:

> "California Penal Code section 834c which implements the Vienna Convention in California, did not take effect until January 1, 2000. Therefore, that provision of law and its mandate to California law enforcement officials did not apply in January 1999 when you suggest Mr. Mardis was arrested."

In fact, of course, the Vienna Convention has been in force, and has thus to be applied between the United States and Germany, since 1971. And the Californian authorities were bound by its obligations not only as a matter of international law but also pursuant to the US Constitution. Now, Mr. President, if, after more than two and a half years of an allegedly intensive campaign for the promotion of compliance with the Vienna Convention, not even the Chief Law Officer of the

State of California is familiar with the state of the law, how can the Respondent seriously maintain before this Court that "nothing more is required"?

11. With this I arrive at the third and last point concerning our list: it mentions a whole series of letters in which US authorities responsible for the breaches of Article 36 express their apologies. You will understand, Mr. President, that Germany can no longer be expected to be satisfied with such attempts to take an easy way out of international responsibility. The rules of international law are there to be respected, and not simply to form the basis for apologies following their breach. An apology may constitute an adequate remedy in isolated cases, but it is neither sufficient nor appropriate if illegal conduct has become a consistent pattern as is unfortunately the case here.

12. Finally, let me turn to Chapter IV of Part II of the US Counter-Memorial, which accuses Germany of making "speculative and unjustified claims about the impact of consular assistance"[18].

13. The first US argument in support of this allegation is an expression of doubt whether the LaGrand brothers would have contacted the German Consulate at all if they had been properly informed of their right to do so. In Germany's view this is an entirely irrelevant point. Besides, we can no longer unfortunately ask Karl and Walter LaGrand what they would have done, and it is — I am sorry to say — rather cynical on the part of the Respondent, after having removed, as it were, the only reliable source of evidence, now to maintain that Germany is to carry the burden of establishing the relevant facts. Germany considers itself under no legal obligation whatsoever to enter into a macabre discussion on the hypothetical conduct of its two nationals. But let me just remind you that as soon as Karl and Walter LaGrand had finally found out about their rights in 1992, they immediately got in touch with the German Consulate. Why, then, should it be "implausible", as the US Counter-Memorial says[19], that they would have acted in the same way immediately after their arrest some ten years earlier?

14. The United States further calls the German claim that early consular assistance would have made a decisive difference "speculative and unjustified". The Counter-Memorial considers that the role of a consul in a case like ours is

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[18] Counter-Memorial, paras. 24 *et seq.*

[19] Counter-Memorial, para. 27.

> "often quite different from the idealized portrait presented in the Memorial. Most importantly, consular officers cannot act as lawyers. The assistance they provide to a defendant in criminal proceedings is limited to assisting in obtaining legal counsel and then assisting legal counsel."[20]

Mr. President, if you read the German Memorial you will see that nowhere do we describe the role of our consular officers in as exaggerated a way as the Counter-Memorial wants you to believe. Of course, consular officers cannot act as lawyers. But they can and will assist their fellow citizens in obtaining adequate legal counsel. This is certainly one of the rights conferred on consular officers under the Vienna Convention. It is precisely the denial of these rights which is at stake here.

15. Further, the doubts of the United States as to whether the German regulations in force at the time of the arrest of the LaGrand brothers corresponded to today's situation, is unfounded. The Circular Order of the German Foreign Ministry in force at the time of the arrest did not merely authorize German consular officials to provide the kind of legal assistance just mentioned. The Order expressly required that in circumstances like ours "a suitable and reliable lawyer should be appointed"[21]. Further, Article 7 of the German Consular Law in conjunction with the Circular Order made it "the duty of missions abroad to assist German nationals held on remand or serving a prison sentence". The respective Order in force since 1998 explains the *raison d'être* of this duty as follows: "[a]rrest represents a particularly severe encroachment on a person's individual freedom,... It is therefore extremely important that Germans under arrest abroad are provided with fast, professional all-round support by German diplomatic missions abroad"[22] and as I have indicated, we have provided the Court with English translations of both of these documents. You will notice that the relevant provisions of the two Orders are virtually identical.

16. When German consular officials finally became aware of the detention of the LaGrand brothers in 1992, the trial and sentencing phase of their criminal proceedings had already been completed. At that stage, due to certain features of US law — to which we will turn later — it was neither possible nor necessary for the German consulate to undertake any immediate urgent action. However, Germany did take all the measures that one could reasonably expect of it. Unfortunately,

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[20] Counter-Memorial, para. 28.

[21] Para. 4 of the 1975 Circular Order.

[22] Para. 1 of the Circular Order on assistance for Germans detained abroad (Ann. 47 to the German Memorial).

in 1992, eight years after Karl and Walter LaGrand had been sentenced to death, there was not much left to do. Mr. President, this brings us right back to the decisive point: it was the US failure to inform the LaGrands which deprived Germany of its right and of the ability to render more effective and timely assistance to the two brothers, in particular by helping them to obtain adequate legal representation in the decisive phases of their trial. Mr. President, it really turns the facts upside down when the United States argues that: "[i]t is also important to remember that the LaGrands' defence was at all times the responsibility of their defence attorneys", and "[b]oth defence lawyers knew that the LaGrands had been born in Germany, but apparently elected not to seek evidence about their early childhoods there"[23]. We do not question the primary responsibility of defence counsel for handling the case. But what we do complain about is that Germany was deprived of its right to help its citizens choose adequate legal representation and then assist them during their trial.

17. In this context, the Respondent rightly emphasizes the extremely important role which defence lawyers play in American criminal procedure — a role which goes far beyond that attributed to defence lawyers in most other legal systems of the world. A recent editorial in the renowned British weekly, *The Economist*, focusing on death penalty cases in the United States, commented as follows:

> "America has had hundreds of thousands of murder trials since 1976. Most of them were potentially capital cases. In practice, the public prosecutors sought the death penalty in fewer than 5% of the cases. Facing experienced and diligent defence lawyers, prosecutors rarely seek the ultimate punishment. But when they do so, it tends to be not because of the severity of the crimes committed, but because the defence lawyer looks easy game."[24]

Mr. President, the LaGrands' defence lawyers were precisely such "easy game". The Arizona Supreme Court attested Karl's attorney "exceedingly low profile", although the Supreme Court could not say "that his performance was so deficient as to compromise the adversarial nature of the trial"[25]. The attorney himself later acknowledged his inadequacy for handling the complex issues involved in a capital case, and he expressly admitted that he should have done a lot of things differently. I invite the Court to examine with me the affidavit of Karl LaGrand's trial lawyer, to be found in Annex 46 to the German Memorial, that is on pages 1013 *et seq*. The lawyer stated upon oath, among other things:

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[23] Counter-Memorial, para. 32.

[24] 10 June 2000, at p. 16.

[25] See Memorial, Ann. 4.

— that when he was appointed to defend Karl LaGrand it was the first time that he represented a defendant in a capital murder case;

— that he had no special CLE, that is Continuing Legal Education, training in handling a capital case;

— that he was uninformed of the level of experience, tasks, tactics and strategies which capital cases required;

— that he initially approached the Karl LaGrand murder case as he had his previous cases: like a "normal felony", just as a "drug case or a robbery";

— that in hindsight, he realized that he was neither prepared nor informed as to what would be involved and that he was overwhelmed both by the high profile nature of the case and by his lack of experience;

— that he had never had an investigator working on the case;

— that he never spoke to family members;

— that he never comprehensively researched, investigated or developed any evidence regarding the petitioner's mental state; and finally

— that he never considered impulsivity or temporary insanity as a viable defence.

Mr. President, Members of the Court, I do not want to comment upon the view of the Arizona Supreme Court, shared by the US Counter-Memorial[26] according to which this kind of defence is still to be regarded as "a constitutionally sufficient level of representation". The only remark I want to make is that it is beyond reasonable doubt that the poor quality of the defence contributed, to say the least, to the brothers LaGrand finding themselves among the less than 5 per cent of potential capital cases in which American public prosecutors sought the death penalty: and this afternoon, Mr. Donovan is going to take up this point in more depth.

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[26] Counter-Memorial, para. 19.

18. Does the United States really want this Court to believe that it is mere speculation that Germany — if it had been informed of the arrest of the LaGrand brothers in time — would have assisted its citizens to obtain better legal counsel, and thus have decisively increased their chance of belonging to the 95 per cent of defendants not sentenced to death after having committed similar crimes? Or, putting it the other way round, does the United States really want to say that Germany — a country particularly committed to achieving the worldwide abolition of capital punishment — would have allowed its citizens to be represented by a lawyer with such a low and inadequate profile in criminal proceedings where their life was at stake?

19. Mr. President, Members of the Court, thus are the facts upon which Germany respectfully asks the Court to base its decision, and a few comments on the differences of interpretation of these facts between the Parties. May I now ask you to call upon my colleague Mr. Daniel Khan to develop our arguments on jurisdiction and admissibility.

LE PRESIDENT : Je vous remercie, professeur Simma. Je donne maintenant la parole à M. Daniel Khan.

Mr. KHAN:

III. JURISDICTION AND ADMISSIBILITY

1. Merci, M. le président. Mr. President, distinguished Members of the Court, it is a great honour and pleasure for me to address you for the first time. My task is to deal with questions of jurisdiction and admissibility. Germany has treated these issues comprehensively in its Memorial. To avoid repetition, my following presentation will therefore be limited to a critical assessment of issues and problems raised in this regard in the US Counter-Memorial.

2. Before entering into the subject-matter, Germany would like to state its satisfaction with the decision of the United States not to raise any preliminary objections. This fact demonstrates that both Parties do concur in the objective of having the present dispute settled as expeditiously as possible.

3. Unfortunately, however, such common ground does not reach very far. When it comes to the scope and nature of the envisaged judicial settlement, what we see is that Germany aspires to a

comprehensive solution of all the substantive legal issues involved. The United States on the contrary is only willing to submit a small proportion of these questions to judicial scrutiny. As to the wide range of further issues raised in our case, the United States tries to hide behind a broad smoke-screen of what it calls "inadmissibility". However, all the questions Germany has raised are not only of importance with regard to the fate of the LaGrand brothers but are, unfortunately enough, of continuing relevance. The scenario that has led to the present litigation has repeatedly occurred in the past and will also haunt us in the future if this Court does not stop it. Just consider the *Breard* case, the recent proceedings before the Inter-American Court of Human Rights, the case of the Canadian citizen Stanley Faulder or that of the Mexican Miguel Angel Flores executed just four days ago, the enormous echo which these cases have produced in the international community, and finally, and most importantly, the deplorable situation in which hundreds of foreign nationals on death row in the United States and elsewhere find themselves. In light of the facts that became apparent in the cases and proceedings mentioned, it is safe to assume that the great majority of these individuals had no chance to enjoy the procedural safeguards provided in the Vienna Convention on Consular Relations. Hence, the time is ripe for a clear and unequivocal pronouncement by the world's highest judicial authority.

I. Jurisdiction

4. Mr. President, of course the desirability, indeed urgency, of a comprehensive settlement cannot replace the jurisdictional basis for a pronouncement of the Court. We all know that "the Court's jurisdiction is always a limited one" — as the Permanent Court observed back in the *Chorzów Factory* case[27]. In the Memorial we demonstrated that Article I of the Optional Protocol to the Vienna Convention establishes the Court's jurisdiction for all the claims which Germany has raised. We note with satisfaction that the US Counter-Memorial expressly shares our view, at least with regard to the German claims concerning Article 36, subparagraph 1 *(b)*, of the Consular Convention[28]. However, the United States does challenge jurisdiction as regards diplomatic protection[29]. Germany, on the other hand, takes the view that "application of the Convention" in

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[27] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, at p. 32.

[28] Counter-Memorial, para. 47.

[29] Counter-Memorial, paras. 73 *et seq.*

the sense of the Optional Protocol very well encompasses the consequences of a violation of individual rights under the Convention, including the espousal of respective claims by the State of nationality. Besides, according to Article 5 of the Consular Convention, the protection of the interests of nationals of the sending State takes a prominent place among consular functions. As to Germany's remaining claims, the United States chooses not to address the issue of jurisdiction at all, followed, however, by a warning in the Counter-Memorial that this silence is to be "without prejudice to its position in any further proceedings in this case"[30]. Now, we hope that the Respondent is aware of the principle, emphasized by Professor Rosenne, according to which objections preliminary in character should always be raised before the interested party joins issue on the merits or, at the latest, simultaneously with the filing of the Counter-Memorial[31]. Thus Germany is confident that the United States will refrain from taking the unusual, indeed highly questionable, step of challenging the Court's jurisdiction at this final stage of the proceedings — a step which would be doomed to failure anyway.

II. Admissibility

5. We observe also that the restraint which the Respondent exercises with regard to the Court's jurisdiction *strictu sensu* does not extend to the question of admissibility. The United States attempts to use this notion to rid itself of all responsibility for what it has done wrong, with the only exception of its breach of Article 36, subparagraph 1 *(b)*, of the Convention. Thus, the United States tries to convince you that it would be inappropriate for the Court to decide upon the following three claims made by Germany: *(a)* the claim that the way US law was applied in the case of the brothers LaGrand violated Germany's rights under Article 36, paragraph 2, of the Vienna Convention; *(b)* the claim that the United States violated its international legal obligation to abide by the Order on Provisional Measures issued by the Court on 3 March 1999, and finally; *(c)* the German request for the granting of judicial relief going beyond the mere proclamation by the Court of the illegality of the breach by the United States of Article 36, subparagraph 1 *(b)*, of the Consular Convention.

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[30] Counter-Memorial, para. 48.

[31] S. Rosenne, *The Law and Practice of the International Court*, Vol. II, Jurisdiction (1997), at p. 864.

6. With regard to all of this, the United States maintains that "significant factors weigh against admitting the claims that underlie Germany's second, third, and fourth submissions"[32]. Frankly, I find the "significant factors" invoked by the United States to support its request for such a sweeping dismissal of most of Germany's claims anything but convincing.

7. Let me start with an assessment of the truly exorbitant concept of "admissibility" which lies at the basis of the Respondent's argumentation. Following this I will proceed to an examination of the three "significant factors". It will certainly not surprise you that Germany will arrive at the conclusion that all three objections to the admissibility of our case are legally untenable and that, therefore, each and every claim Germany raises in the present proceedings is admissible.

8. "Admissibility", according to the Counter-Memorial, "requires the Court to weigh whether characteristics of the case before it, or special circumstances related to particular claims, may render either the entire case or particular claims inappropriate for further consideration and decision by the Court"[33]. The rather authoritative tone of this statement stands in marked contrast to the total lack of reference to the jurisprudence of this Court or any other source in its support. Thus, we may be allowed to ask whether such a sweeping understanding of "admissibility" reflects the true state of the law.

9. Mr. President, Members of the Court, a careful analysis of the jurisprudence of this Court and its predecessor on the matter of admissibility has led us to conclude that the picture drawn by the United States does not correspond to the Court's own perception of this issue. It is certainly true that, as the Court emphasized in the *Northern Cameroons* case[34], the judicial function is circumscribed by inherent limitations which may be difficult to catalogue. However, we discern from the jurisprudence of the Court at least two essential features which throw light on the way in which this Court and its predecessor have handled issues of admissibility throughout.

10. First of all, the Court has accepted a plea of inadmissibility only if based on special and peculiar circumstances. Therefore, the concept of "admissibility" introduced by the United States

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[32] Counter-Memorial, para. 49.

[33] *Ibid.*

[34] *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, at p. 30.

is mistaken in its implication that all there is to do in order to determine whether a case is appropriate for further consideration and decision by the Court is a simple weighing of characteristics. Rather the rule seems to be in the nature of a presumption according to which the existence of a jurisdictional bond between the parties in a given case implies the admissibility of the claims raised therein. This presumption can be rebutted only under very specific circumstances. Indeed, this Court has never claimed discretion whether to entertain a contentious case or not. The Court has refused to do so only in very particular circumstances and after "mature consideration", to use the words of the Permanent Court in the Judgment in the *Free Zones* case[35].

11. Second, a concept of "admissibility" as vague and broad as that put forward by the United States could lead one to assume that the grounds for admissibility or inadmissibility of a case or of certain claims cannot be concretized in any foreseeable way. This is simply not true. A closer look at the jurisprudence of the Court reveals that it has always, and in very explicit terms, treated the safeguarding of its judicial integrity as a crucial benchmark for the evaluation of admissibility. In the *Northern Cameroons* case, the Court described itself as "the guardian of [its own] judicial integrity"[36]. In the *Nottebohm* case, the Court confined its role to the "administration of justice"[37], as the Permanent Court had already done in the *Free Zones* case where it had stressed its position as a court of justice — a qualification which made the Court somewhat reluctant to act "outside the sphere in which a court of justice, concerned with the application of the rules of law, can help in the solution of disputes between two States"[38]. Finally, in the *Haya de la Torre* case, this Court refused to make a choice between several alternatives based on considerations of practicability or of political expediency, because it felt that "it is not part of the judicial function to make such a choice"[39]. This clear line of reasoning goes hand in hand with a justified reluctance of the Court to enter into the merits of a case if it foresees that its judgment would remain ineffective. Let me refer, for instance, to the Court's decision in the *Monetary Gold* case[40], where the absence

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[35] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, at p. 161.

[36] *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, at p. 29.

[37] *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, at p. 122.

[38] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, at p. 162.

[39] *Haya de la Torre, Judgment, I.C.J. Reports 1951*, at p. 79.

[40] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, at pp. 19 *et seq.*

from proceedings of Albania, whose legal position constituted the very subject-matter of the case, made it foreseeable that nothing would come of any possible judgment by the Court. In the *Northern Cameroons* case the Court declined to decide merely hypothetical questions lacking any real purpose[41]. Finally, in the *Nuclear Tests* cases, the Court held that "[i]t does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*"[42].

12. If we translate the case-law thus described into more abstract terms, we could say that in the practice of this Court, admissibility is concerned with the question whether in all the circumstances it is compatible with the Court's status as the principal judicial organ of the United Nations, with its judicial function or with the judicial character of its decisions, to enter into or pursue proceedings on the merits in a given case[43].

13. In light of this, and turning to our present case, I must confess that I am really at a loss to see how the present affair or any of the claims Germany raises in its context could possibly fit into the jigsaw of precedents on inadmissibility. All Germany is doing is to raise in an ongoing legal dispute a number of claims based on purely legal arguments. First, Germany requests the Court to find the United States in breach of certain rules of the Vienna Convention on Consular Relations. Second, Germany asks the Court to find that the United States violated the Order of the Court of 3 March 1999. In both instances, what Germany seeks is a declaration of this Court as the most appropriate remedy for the wrong it had suffered. Third, Germany demands, as a further, separate legal remedy, safeguards against repetition in order to prevent future violations of its own rights and the rights of its nationals.

14. Mr. President, Members of the Court, can our raising these purely legal questions affect the judicial integrity of this Court in any conceivable way? Certainly not! On the contrary, Germany would submit that there have been few instances in which the Court was called upon to settle a dispute so free of political implications as is the case here, instances in which clearly-defined international legal issues were at stake, allowing this Court to act strictly within the sphere

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[41] *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, at pp. 33 *et seq.*

[42] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, at p. 272, para. 59; and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, at p. 477, para. 62.

[43] *Cf.* S. Rosenne, *The Law and Practice of the International Court*, Vol. II, Jurisdiction (3d. ed. 1997), at p. 546.

of its judicial function, that is, deciding upon concrete rather than abstract, actual rather than hypothetical legal questions, and thereby settling an ongoing legal dispute.

15. To conclude my general remarks on the question of admissibility, none of the legal issues dividing the Parties have yet been settled: Germany has not received declaratory relief by way of a pronouncement of this Court; it has not received the assurances and guarantees which it had asked for; and finally the written pleadings reveal a considerable number of legal and factual issues that are still in dispute between the Parties.

16. Let me now turn to the three specific objections which the Respondent has raised against the admissibility of certain of Germany's claims.

17. In the first of these objections, the United States argues that "[t]he Court need only address Germany's first submission in order to do justice between the Parties", and that a judgment on Germany's first submission would "resolve and do justice as to the *central* dispute between the Parties and affirm the importance of the Vienna Convention in international relations"[44]. Mr. President, distinguished Members of the Court, this is indeed a surprising and — as far as we can see — unprecedented assertion. When a State submits to the Court, as we do, four distinct claims, it is certainly not for the Respondent to decide which of these claims are "central" and which are not. The simple fact is that the present dispute encompasses more than the subject-matter covered by Germany's first submission. Germany for its part is not primarily interested in a general statement of this Court affirming the importance of the Vienna Convention in international relations. Rather, our prime objective is to seek justice in our specific case — a case which happens to raise questions of the interpretation and application of a variety of international norms. In Germany's view, a comprehensive judicial settlement of the present dispute can only be reached if the Court addresses the merits of all of Germany's claims. And to reach such a comprehensive judicial settlement is precisely what the Court itself has always considered to be its very function.

18. This leads me to the second objection, according to which the Court should declare certain claims of Germany inadmissible because, in the view of the United States, they would result

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[44] Counter-Memorial, para. 50 (emphasis added).

in the Court having "to assume an inappropriate and unauthorized role as the overseer of US national courts"[45].

19. Mr. President, distinguished Members of the Court, be assured that Germany is well aware that the function of this Court is not to act as a court of criminal appeal. You have emphasized this yourself in your Orders on Provisional Measures both in the *Breard* case and in our present case. At the risk of spinning the prayer wheel once again, let me emphasize that the claims which Germany has brought before you aim at nothing but the settlement of an international legal dispute arising out of the interpretation and application of the Vienna Convention. What we respectfully ask this Court to do is: *(a)* to follow our interpretation of certain rules of international law; *(b)* to adjudge and declare that the conduct of the Respondent, that is, in the words of the Optional Protocol, the "application" of the Consular Convention by the United States, was inconsistent with its international legal obligations towards Germany; and *(c)* to draw from this failure certain legal consequences provided for in the international law of State responsibility. Hence, the present proceedings are in no way aimed at interfering with the administration of justice within the United States judicial system. Nor does Germany request that this Court overrule any of the US domestic judgments delivered in the case of the LaGrand brothers.

20. Mr. President, we consider it self-evident and a matter of simple logic that the legal operation which we ask the Court to undertake must necessarily include a critical assessment of the conduct of organs of the United States, including its judicial and legislative branches. The only reason why Germany addresses questions of the internal law of the United States — criticized by the Counter-Memorial as "lengthy discussions of US domestic law"[46] — is to demonstrate that certain features of US law and its application in the present case, in particular the doctrine of "procedural default", have led to violations by the United States of legal obligations arising under the Vienna Convention. There is nothing special or problematic in attributing breaches of international law to a State's judiciary. A statement by the International Court according to which US domestic courts participated in, or contributed to, such breaches is neither inappropriate nor unauthorized — on the contrary.

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[45] Counter-Memorial, paras. 51 *et seq.*

[46] Counter-Memorial, para. 52.

21. Mr. President, in its third objection the United States challenges the admissibility of our submission relating to the Order of 3 March 1999[47]. Let me recall what Germany requests there: we ask the Court to adjudge and declare that the United States violated its international legal obligation to comply with this Order.

22. Now, if we regard the arguments of the United States on this point, we find that the American criticism is directed against the Court rather than against Germany. The United States complains that "Germany's decision to file as it did resulted *in the Court setting aside some fundamental aspects of judicial procedure*"[48]. The Respondent further deplores "a failure of justice" in the procedure followed by the Court, and finally accuses the Court of not having observed "basic principles of the judicial process"[49].

23. Mr. President, distinguished Members of the Court, we cannot let these accusations pass unchallenged. We realize that it must have been a difficult step for the Court to issue an Order on Provisional Measures in such a procedurally unprecedented manner. You have certainly done so only after assessing the situation as one of "incontestable urgency", as the former President of this Court, Judge Schwebel, recognized in the *Breard* case[50]; and after admitting the presence of cogent "humanitarian reasons", to use the words of Judge Oda[51]. Germany very much appreciates this decision with which you brought your judicial authority to bear for the protection of a human life which was virtually in your hands. We can only regret that the United States did not honour this difficult and responsible decision by giving effect to the Order. We simply cannot exclude that in the future the Court may again be confronted with exceptional situations which leave it no choice but to vary established patterns of procedure, if this is the only way to do justice in cases of extreme urgency. Germany is convinced that the Court has kept within the limits of a correct

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[47] Counter-Memorial, paras. 55 *et seq.*

[48] Counter-Memorial, para. 63 (emphasis added).

[49] Counter-Memorial, paras. 64 and 66.

[50] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, declaration of President Schwebel, *I.C.J. Reports 1998*, p. 259.

[51] *Ibid.*, declaration of Judge Oda, *I.C.J. Reports 1998*, p. 260, para. 8; and *LaGrand Case (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999*, declaration of Judge Oda, *I.C.J. Reports 1999*, p. 20, para. 7.

application of the rules in question. This decision deserves the highest respect of the international community.

24. In view of what I have said, it is difficult to grasp the object and purpose of the United States objection. Does the Respondent want the Court to invalidate its own Order on account of alleged procedural deficiencies, or is the Court to treat the Order as somehow defective, and therefore of diminished legal relevance?

25. Mr. President, it was this Court which decided autonomously to proceed as it did and to issue that Order. A discussion of the scope and legal relevance of this Order certainly does not fall under the topic of admissibility. We should not at this point take up any questions which belong to the merits of our case, and should avoid a Shakespearean "play within a play", to quote our late colleague and friend Keith Highet[52].

26. In conclusion of my treatment of the question of admissibility, let me say a word about what the Respondent calls "Germany's choice of timing". As we explain in our Memorial, Germany had good reasons to act in the way it did. Besides, as the United States rightly remarks, "there is no uniform 'statute of limitations' in international law, nor are there clear requirements dictating when a case must be filed with this Court"[53]. Thus, both Parties agree that lateness as such does not constitute a bar to admissibility.

27. What the United States apparently does consider to be such a bar is that Germany could have been aware of all relevant facts of the case, among them the fact that the Arizona authorities knew from the very beginning that the LaGrand brothers were German nationals, if only Germany had paid due attention to the so-called Presentence Reports of 1984. But may I respectfully remind you that it was only in 1992 that German consular officials first became aware of the arrest of the LaGrand brothers? This was no less than eight years after the sentencing proceedings had taken place and the Presentence Reports had been produced. It is true that, as far as the LaGrands' defence lawyers were concerned, they did not pay attention to the indication of the brothers' nationality in these reports. This casts indeed a negative light on the quality of their defence at the

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[52] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Provisional Measures*, Pleadings, CR 98/4, 6 March 1998, p. 62, para. 28.

[53] Counter-Memorial, para. 58.

time. But, Mr. President, Germany's point is precisely that the defence of Karl and Walter LaGrand would have been much more effective if a German consulate had had the opportunity to see to it.

28. In light of the foregoing, the only question that makes sense at all in this context is whether German officials did or did not have easy access to the Presentence Reports in 1992 or thereafter. Although we do not attribute any conclusive weight to this issue, we can provide you with a clear answer. We have filed with the Court a Memorandum regarding the Presentence Reports issue in the LaGrand matter, drafted by the Federal Public Defender for the District of Arizona at the request of the German Consulate General in Los Angeles. Let me summarize what this Memorandum says: According to a local rule of the Pima County Superior Court, the Presentence Reports concerning Karl and Walter LaGrand were filed under seal and kept confidential even after sentencing. When the Federal Public Defender tried to locate this report in June of this year, they could not be found. In the words of the Public Defender:

> "The exhibits clerk at the superior court advised that the clerk did not have pre-sentence reports information on either LaGrand, and they had no idea where the pre-sentence reports were filed. It appears that the pre-sentence reports are not even in the superior court file."

Mr. President, if not even the competent US authority managed to retrieve the reports, does it make sense to say, as the Counter-Memorial does, that it is "hard to understand how these reports were not already familiar to German consular officers"[54]? Can one really accuse a foreign consulate of negligence when it failed to get hold of documents which could not even be traced by the competent local authorities?

29. In view of the foregoing and with reference to the further explanations in our Memorial, Germany therefore respectfully requests the Court to declare that it has jurisdiction to hear this case and that each and every claim Germany has raised is admissible.

Monsieur le Président, Madame et Messieurs de la Cour, je vous remercie de votre attention. Mr. President, I thank you and the Members of the Court for your attention. May I now invite you to call upon my colleague Mr. Kaul to address the Court on the US breaches of Article 36, paragraph 1, of the Consular Convention.

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[54] Counter-Memorial, para. 60.

Le PRESIDENT : Je vous remercie beaucoup. La Cour va tout d'abord suspendre pour dix minutes.

L'audience est suspendue de 11 h 40 à 11 h 55.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne maintenant la parole pour l'Allemagne à M. Kaul.

Mr. KAUL: Merci, M. le Président.

IV. ARTICLE 36, PARAGRAPH 1, OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

1. Mr. President, distinguished Members of the Court, it is my honour and privilege to appear before you on behalf of Germany. My task is to assess the violations of paragraph 1 of Article 36 of the Vienna Convention committed by the United States. In doing so, I will, first, briefly recall the rights embodied in Article 36 and the content and structure of this crucial provision. Second, I will set out why the acknowledgment of the violation of the Convention by the United States is insufficient to meet its obligations towards Germany and that it is based on a restrictive and very problematic interpretation of Article 36. In conclusion, I will show that Article 36, paragraph 1, has been violated by the United States not only with regard to subparagraph 1 *(b)*, but also with regard to subparagraphs 1 *(a)* and *(c)*.

2. Mr. President, the dispute between the United States and Germany turns around one central problem: the United States reads Article 36 of the Vienna Convention in a very narrow and restrictive way. As the case of the LaGrand brothers clearly demonstrates, this can deprive the right of foreign nationals to be informed of their right to consular communication of most of its practical meaning.

In contrast, Germany maintains that Article 36 provides a régime that guarantees foreigners effective access to consular advice, and second, that this régime also includes a minimum standard for national laws and regulations to render the right to consular communication meaningful and effective.

I. Article 36 of the Vienna Convention on Consular Relations

3. Mr. President, what are the rights embodied in Article 36, what is the content and structural build-up of this provision?

As you are aware Article 36, paragraph 1, contains several rights of foreign nationals to ensure communication and contact with their consulate, this in three subparagraphs, namely Article 36, subparagraphs 1 *(a)*, 1 *(b)* and 1 *(c)*.

As the distinguished Members of the Court have the exact wording of Article 36 of the Vienna Convention before them, it is not necessary to read out again the full text of this important provision. Instead, let me briefly recall

- subparagraph 1 *(a)* contains the right of consular officers to communicate and to have access to their nationals and vice versa;
- subparagraph 1 *(b)* establishes the specific rights of the sending State and of a national of this State so that in case of an arrest these rights to communicate and to have access to each other can be used effectively. This it does by ensuring
    - that the arrested person is informed without delay about his right to communicate with the consulate;
    - if he so wishes, the competent authorities of the receiving State must then, again without delay, inform the consulate, which in turn can now make use of its right of communication and access to its nationals as set out in
- subparagraph 1 *(c)*: the consulate can use its right to visit the detained national, to correspond with him, and — most importantly — to arrange for his legal representation.

Now, when we regard the content and structure of Article 36, paragraph 1, in our examination of the case of the LaGrand brothers, what is the decisive point?

Mr. President, the decisive point, indeed, the absolutely crucial test is whether the authorities inform the arrested person without delay of his right to contact the consulate.

Why is this so decisive?

Because — and I cannot stress this point too much — when this obligation of the receiving State is violated, the other rights contained in Article 36, paragraph 1, become in practice irrelevant, indeed meaningless.

It is decisive that the foreigner be informed about his right to establish contact with his consulate. It is essentially through this provision that the Convention ensures that the *other* rights contained in Article 36, paragraph 1, can be implemented effectively. This concerns both the right to communication with the consulate under subparagraph 1 *(a)* and the right of the consulate to visit the detained national, to correspond with him, and, most importantly, to arrange for his legal representation under Article 36, subparagraph 1 *(c)*.

To sum up: respect for the obligation to inform the foreigner about his right to establish contact with his consulate is ***a prerequisite*** for the effective use of the other rights embodied in Article 36, paragraph 1. Without the fulfilment of this ***conditio sine qua non***, consular assistance as foreseen in Article 36, subparagraphs 1 *(a)* and *(c)*, becomes an abstract principle, dead letter, without any practical meaning. As we see, this can have the most deplorable, fatal consequences as in the case of the LaGrand brothers, especially in a country in which the death penalty is frequently applied. In such a case, a restrictive and incorrect interpretation of Article 36 can, as our case demonstrates, literally tip the balance in a matter of life and death.

4. Mr. President, I now turn to Article 36, paragraph 2. Article 36, paragraph 2, deals with the important question of the implementation of the rights just set out in the internal law of the receiving State. The paragraph reads:

> "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

It is clear that Article 36, paragraph 2, in no way limits or reduces the obligations of the receiving State under Article 36, paragraph 1. It only deals with the modalities of their exercise. On the one hand, paragraph 2 makes it plain that Article 36 does not affect the validity of national laws and regulations. On the other hand, and this is absolutely central to Germany's case, Mr. President, Article 36, paragraph 2, puts the receiving State under a specific obligation. This State must enact laws and regulations that do render effective the exercise of the rights under Article 36. Paragraph 2 requires that the purpose of Article 36 be fulfilled, namely that foreigners actually do have access to the services of their consulate if they so wish. Therefore, the receiving State must shape its domestic law in a way that renders the actual exercise of the rights of

Article 36 effective, meaningful and practicable. We will show, Mr. President, that US law fails to do so by virtue of the existence and application of rules such as the rule of "procedural default" and the *Anti-Terrorism and Effective Death Penalty Act*.

5. Mr. President, Germany notes with satisfaction, limited satisfaction, that the United States has acknowledged that it failed to inform the LaGrand brothers in 1982, upon their arrest and detention, of their right to contact their consulate, as required by Article 36, paragraph 1. But, of course, faced with clear and unequivocal evidence contained in the Presentence Reports that the Arizona authorities were aware of the German nationality of the brothers all along, the United States acknowledgment only admits the obvious: that the LaGrand brothers were of German nationality; that the Arizona authorities, in full knowledge of that fact, failed to inform the German authorities; that therefore the United States is responsible for this failure of the Arizona authorities to live up to Article 36.

II. The interpretation of Article 36, paragraph 1

6. Mr. President, I now turn to my second question:

How can the United States affirm such a narrow and restrictive interpretation of Article 36 as it has done in the Counter-Memorial?

We are concerned, Mr. President, that certain remarks in the Counter-Memorial on, first, the "without delay" requirement, then, on the drafting history and finally on State practice concerning Article 36 cast serious doubt on the unequivocal commitment of the United States to acknowledge that violation. Therefore, in spite of the US admission of a breach of Article 36, subparagraph 1 *(b)*, Germany finds it necessary to clarify the interpretation of Article 36, paragraph 1.

1. The requirement to inform "without delay"

7. Mr. President, the restrictive and incorrect US interpretation of the "without delay" requirement in Article 36 is particularly obvious.

Referring to the wording of Article 36, subparagraph 1 *(b)*, requiring notification "without delay", the United States quite surprisingly takes the view that such notification may also be postponed, resulting in "notification occurring after critical events in a criminal investigation have occurred"[55]. The United States even argues that Article 36 and other consular agreements "do not tie consular notification to any particular stage of an investigation or prosecution"[56]. Mr. President, is "without delay" — in the US view — something else than "without delay"? Does this approach not fly in the face of the effective implementation of Article 36, subparagraph 1 *(b)*, as required by the Vienna Convention? If it were correct, one could regard a notification just before the execution of the convicted as sufficient! The LaGrand case shows that such a strange, indeed almost cynical, view of "compliance" is not merely theoretical: the brothers were informed of their right to consular notification briefly after the end of the *habeas corpus* proceedings in which their last appeal was denied by Supreme Court on 21 December 1998 — more than 16 years after their arrest and less than three months before they were executed.

8. The United States is correct to state in paragraph 86 of the Counter-Memorial that the Vienna Convention does not "obligate consular officials to grant any measure of substantive consular assistance". But this observation, again, is beside the point. What is decisive is that the Convention accords the right to provide such support. Article 36, subparagraph 1 *(c)*, provides consular officers "to arrange for [the] legal representation" of a detainee and to correspond with him, including giving advice on his conduct during the trial and the assistance by counsel. To effectively exercise this right, the notification must be "without delay", that is, timely enough to allow for effective legal representation to be arranged from the very beginning of the criminal process. Again: informing detainees later than that does not conform to the requirement that notification shall happen "without delay", that is, immediately after the arrest. By informing the LaGrand brothers of their right to inform the consulate more than 16 years after their arrest, the United States has therefore clearly failed to meet the standard of Article 36.

2. The abuse of the *travaux* by the United States

9. Then, Mr. President, the United States tries to limit the scope of Article 36 by referring to the drafting history of the provision and State practice. As we have shown and will continue to

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[55] Counter-Memorial, para. 84.

[56] *Ibid.*, note 90.

show, the United States has badly misinterpreted the *travaux* by relying on proposals flatly rejected by the Conference. At this point I will limit myself to just one example, a telling example indeed.

10. The drafting history of the provision on the right to be informed of one's right of contact with the consulate was difficult. Nevertheless, as far as the prohibition of delay is concerned, it is quite clear. The requirement to notify the consulate of the receiving State without delay was first proposed by the ILC. But the ILC still demanded information of the consulate "without *undue* delay"[57]. Following a proposal of the United Kingdom, the Second Committee of the Diplomatic Conference removed the word "undue". It thus strengthened the obligation of prompt notification[58], and the result is that Article 36, paragraph 1 *(b)*, does not allow for any delay in informing the detainee of his rights. It was a common opinion *opinio juris* that a foreigner has an individual right to receive without delay the assistance of his consulate, the idea was that the notification of the detainee of his rights should be mandatory, that it should be effective and that it must not be discretionary.

3. State practice

11. Mr. President, why can State practice neither support nor justify the restrictive and incorrect interpretation of Article 36 by the United States?

- First, State practice is scarce and inconclusive.
- Second, none of the existing cases, none deals, as our case does, with the specific question, whether imposition of the death penalty impaired by a violation of the right to consular assistance should be open to review or not (the only exception being the *Breard* case well-known to this Court).
- Third, most violations of Article 36 happen in minor cases, and are then resolved in the course of criminal proceedings, as in the two German cases cited in the United States Counter-Memorial.

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[57] United Nations Conference on Consular Relations, United Nations Doc. A/CONF.25/16/Add.1 (1963), Vol. II, at p. 24, draft Article 36, paragraph (1) *(b)*.

[58] *Ibid.*, Vol. II, at 85 (amendment proposed by the UK, United Nations Doc. A/CONF.25/C.2/L.107 (1963); *ibid.*, paragraph 106 *(c)*, at p. 131.

Most of the few cases referred to by the United States deal with the specific question whether evidence obtained by without information on consular assistance can be used in the criminal proceedings for a conviction or not. This has of course very little to do with the fundamentally different question whether imposition of the death penalty impaired by a grave and sustained violation of the right to consular assistance should be open to review or not.

With regard to the impact of a violation of Article 36 on criminal proceedings, US Judge Boochever, in his vigorous dissent in the *Lombera-Camorlinga* case, stated:

> "I agree with the majority's conclusion that 'a foreign national's post arrest statements should not be excluded solely because he made them before being told of his right to consular notification'.... But when the foreign national can show that he or she has been prejudiced by the failure to advise him or her of such a right, that prejudice should be rectified . . ."[59]

If this is correct, Mr. President, is it not even more necessary to rectify the prejudice in question if it concerns circumstances leading to the pronouncement of the death penalty?

To be very clear, Germany has not demanded automatic reversal of all convictions impaired by a violation of Article 36 and it does not intend to do so now. What Germany does request, and what we will set out in detail later, is that a conviction or sentence impaired by a violation of the right of a foreign national to notification can be reviewed in the course of later proceedings, in particular in cases involving the pronouncement of the death penalty.

III. The violation of Article 36, paragraph 1, by the United States

12. Mr. President, I now turn to my third and last question.

Why is the limited acknowledgment by the United States of a violation of Article 36 not sufficient to do justice between the parties?

The answer is: first, the United States fails to admit the violations of Article 36, subparagraphs 1 *(a)* and *(c)*, that go along with the violation of Article 36, subparagraph 1 *(b)*; second, the United States does not admit that its laws and regulations do not live up to the standards required by Article 36, paragraph 2, of the Vienna Convention because they do not enable full effect to be given to the purposes for which the rights in Article 36, paragraph 1, are established; third, the United States does not recognize that Article 36 creates individual rights, that their violation also infringes upon Germany's right of diplomatic protection, and that these factors aggravate the original violation.

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[59] Counter-Memorial, Ann. 9, p. 5.

13. As to the violations of Article 36, subparagraphs 1 *(a)* and *(c)*, subsequent to the lack of consular information, really what shall one think of the US objections to the effect that Germany's respective claims are to be regarded as mere "add-on" claims and thus "misplaced"?

It is commonplace that one and the same conduct may result in several violations of distinct obligations. If the obligation to inform the detainee of his rights and to help him establish contact with his consulate is violated, the detainee cannot establish contact with his consulate, he cannot communicate with the consulate, he cannot receive visits from consular officers, he cannot be supported by adequate counsel, because he is not aware of his right. Therefore, violation of this right is bound to imply violation of the other rights. As became obvious in the LaGrand trial, the brothers were only able to contact the consulate in 1992, when it was too late. After conviction and sentencing, German consular support could no longer have any effect, especially not with regard to the imposition of the death penalty. Hence, later observance of the rights of Article 36, subparagraphs 1 *(a)* and *(c)*, could not remedy the previous violation of those provisions.

Mr. President, eventually the result was the death of the LaGrand brothers. In the case of Walter LeGrand, these serious violations of the Vienna Convention were then further aggravated by a deliberate violation of the binding Order of this Court of 3 March 1999.

14. Mr. President, distinguished Members of the Court, I would now kindly ask you to call upon my colleague, Mr. Paulus, to show that the United States has also violated Article 36, paragraph 2. I thank you.

Le PRESIDENT : Je vous remercie, M. Kaul. Je donne maintenant la parole à M. Andreas Paulus.

Mr. PAULUS:

V. ARTICLE 36, PARAGRAPH 2, OF THE VIENNA CONVENTION

1. Mr. President, distinguished Members of the Court, it is a great honour for me to represent Germany before this Court. I will argue that, in the case of the LaGrand brothers, the United States

has violated Article 36 of the Vienna Convention, especially paragraph 2 thereof, by the application of its domestic law. In its Memorial, Germany has set out in great detail the reasons why it regards the application of the principle of procedural default and of the Antiterrorism and Effective Death Penalty Act as a violation of Article 36, paragraph 2, of the Vienna Convention. In the present pleadings, Mr. President, I will not go too deeply into the details of US domestic law. In fact, our analysis of US law has remained largely undisputed in the Counter-Memorial. What the Parties are in disagreement about is the conformity *vel non* of US law with the rights of foreigners under Article 36, subparagraph 1 *(b)* and paragraph 2, of the Vienna Convention. That issue is one of international law, and, Mr. President, that is precisely the issue which is before you today.

2. I shall develop the German argument concerning the violation of Article 36, paragraph 2, in three stages:

— My first argument will be that the interpretation of Article 36, paragraph 2, its object and purpose as well as its drafting history, demonstrate that the provision was intended to ensure the primacy of the international obligations flowing from Article 36 over internal laws and regulations which do not give full effect to the purposes for which the rights accorded under Article 36 are intended;

— second, I will argue that US law and practice do not give full effect to these rights and are therefore in violation of Article 36, paragraphs 1 and 2; and,

— third, I will argue that there are no exceptions as to the primacy of Article 36 over national law and that therefore the United States needs to change either its laws or the application of its laws in a way that ensures that, in the future, Article 36 will be respected in domestic proceedings.

The PRESIDENT: May I interrupt you for one second to ask you to speak a little more slowly, because the interpreters have some problem with your speed.

Mr. PAULUS: Excuse me, Mr. President.

I. Interpretation and drafting history

3. Mr. President, the wording of paragraph 2 of Article 36 leaves no doubt concerning its meaning: on the one hand, the provision demands that "[t]he rights referred to in paragraph 1 of

this article shall be exercised in conformity with the laws and regulations of the receiving State". That is stating the obvious: Article 36, paragraph 1, does not permit disregard of domestic law. For instance, taking up an example used by the International Law Commission[60], domestic rules on prison visits have to be followed.

4. On the other hand, however, those laws and regulations must not impede the effective exercise of the rights under paragraph 1. This is the "proviso" contained in the second half-sentence of paragraph 2: the domestic laws and regulations in question are "subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended". In this way, the primacy of international law over domestic law is confirmed and maintained. In addition, what is required here is a purposive reading of paragraph 1, that is, the rights accorded under paragraph 1 must effectively achieve their purpose, in other words, ensure effective communication and support from the consulate to the detained national. Hence, we are faced here with a provision that makes the effectiveness of international law the yardstick for its implementation by domestic law. As Germany will show, US law does not meet that requirement.

II. The misreading of the *travaux* by the United States

5. Mr. President, before I go into the details of the failure of US law to live up to the standard of Article 36, paragraph 2, let me briefly react to the analysis of the drafting history of the provision in the Counter-Memorial. A look at the *travaux* will reveal that the reading suggested by the United States is contradicted by the drafting history.

6. The Counter-Memorial refers to the Commentary of the ILC on its draft of Article 36, paragraph 2, and argues that the ILC intended to limit the proviso to "the mechanics of prison visits"[61]. But this conclusion is based on a plainly incomplete reading of the ILC Commentary. Actually, paragraph (5) of the Commentary to draft Article 36 refers to prison visits as an example of circumstances which should be subject to internal laws and regulations. However, paragraph (7)

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[60] ILC Commentary to draft article 36, in: United Nations Conference on Consular Relations, United Nations Doc. A/CONF.25/16/Add.1 (1963), Vol. II, at 24, para. (5).

[61] Counter-Memorial, para. 80.

of the Commentary refers to all rights contained in draft Article 36. Therefore, the proviso was to concern all the rights enumerated in Article 36, paragraph 1[62].

7. Besides, the Commentary of the Commission referred to its own draft, not to Article 36, paragraph 2, of the Convention as it now stands. The ILC draft only demanded that internal laws and regulations "must not nullify" the rights under Article 36[63]. Obviously, the ILC proposal was weaker than the final text of the Convention, which requires not only the non-nullification of the rights of foreign nationals, but that "full effect . . . be given to the purposes for which the rights accorded under this article are intended". The UK delegate, Mr. Evans, explained the UK amendment[64] which was later adopted by the Conference as follows:

> "It was realized that consulates must comply with laws and regulations on such matters as prison visiting and what might be given to the prisoner. It was of the greatest importance, however, that the substance of the rights and obligations in paragraph 1 must be preserved."[65]

Thus, contrary to what the United States maintains in paragraph 80 of its Counter-Memorial, what is decisive is not whether an impermissible law concerns prison visits or other matters but whether it would hamper the exercise of the rights under Article 36, paragraph 1. As Germany will demonstrate, Mr. President, that is exactly what US law does.

8. In his defence of the proposal which was to become Article 36, paragraph 2, of the Vienna Convention, the UK delegate added:

> "The Ukrainian delegation had implied that municipal law should prevail over international law; but that objection could not apply to the rights recognized in paragraph 1 of article 36."[66]

Thus, the wording of Article 36, paragraph 2, requires an analysis of national law in the light of the object and purpose of Article 36, not merely an analysis whether the *wording* of the rights is expressly counteracted by national law. It is thus far too narrow when the Counter-Memorial contends that

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[62] United Nations Conference on Consular Relations, Official Records, Vol. II, United Nations Doc. A/CONF.25/16/Add.1 (1963), at p. 24.

[63] *Ibid.*, at p. 24.

[64] United Nations Doc. A/CONF.25/C.2/L.107 (1963), in United Nations Conference on Consular Relations, United Nations Doc. A/CONF.25/16/Add.1 (1963), Vol. II, at p. 85.

[65] United Nations Conference on Consular Relations, *op. cit.*, Vol. I, p. 347, para. 47.

[66] United Nations Conference on Consular Relations, *op. cit.*, Vol. I, p. 348, para. 10.

> "[t]here is no suggestion in the text . . . that the rules of criminal law and procedure under which a defendant would be tried or have his conviction and sentence reviewed by appellate courts are also within the scope of this provision"[67].

Rather, the "purposes" phrase is sufficiently broad to include all domestic provisions which could hamper the exercise of the rights under Article 36. Indeed, given the different legal systems of the world, an enumeration of matters of domestic law to which Article 36, paragraph 2, refers is neither necessary nor possible.

9. Mr. President, in its Counter-Memorial the United States makes a great deal of the Soviet and Byelorussian opposition to the wording of Article 36, paragraph 2. It thus relies on the position of States that voted against this provision and did not ratify the Convention until 1989 precisely because they — correctly — believed that Article 36, paragraph 2, would require considerable changes of their laws and practices — steps they were not ready to take. As the Ukrainian delegate to the 1963 Conference put it: "The words in question entailed a serious danger of pressure by international rules on national legislation . . ."[68]

How such objections by opponents of a provision could "reflect a publicly stated understanding of the negotiators", as the Counter-Memorial asserts[69], is difficult to see. If the position of the opponents of Article 36 proves anything, it is that those States, when they realized the far-reaching implications of this provision, opposed it and, ultimately, remained outside the treaty. It was only after a fundamental change of political circumstances that the Soviet Union, Belarus and Ukraine acceded to the Convention more than 25 years later[70].

10. To repeat, Mr. President, the United States reading of Article 36, paragraph 2, is so narrow as to render Article 36 ineffective as against domestic laws, whereas the interpretation advanced by Germany ensures the effectiveness of the provision. Under the correct reading, Article 36, paragraph 2, makes all domestic laws and regulations subject to the effective exercise of the international rights and duties under Article 36, paragraph 1. That is exactly why this proviso

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[67] Counter-Memorial, para. 79.

[68] United Nations Conference on Consular Relations, *op. cit.*, Vol. I, p. 42, para. 47.

[69] Counter-Memorial, para. 81.

[70] Multilateral Treaties Deposited with the Secretary-General, United Nations Doc. ST/LEG/SER.E/18 (Vol. I) (2000), Ch. III 6.

was proposed by the ILC, and was then even strengthened in the deliberations of the future States parties at the Vienna Conference.

III. The effects of US domestic law on the rights under Article 36

11. Mr. President, let me now turn to the question of whether United States laws and regulations as applied by United States courts in the LaGrand case live up to the standards of Article 36. In its Memorial, Germany has set out in detail the impact of the municipal law doctrine of procedural default and the Antiterrorism and Effective Death Penalty Act. As far as we can see, the United States has by and large accepted our description of its domestic law and jurisprudence — indeed, its only criticism was that we had depicted recent developments in too positive a light[71]. Indeed, if we review US jurisprudence, including judgments rendered after Germany's Memorial was deposited, we cannot exclude the possibility that effective implementation of Article 36 may require some legislative changes and not only an altered application of the laws currently in force. But this is nothing exceptional. As the Permanent Court of International Justice stated in its Advisory Opinion on the *Exchange of Greek and Turkish Populations*, in interpreting a treaty clause expressly prescribing the adaptation of domestic law to international obligations:

> "This clause . . . merely lays stress on a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken."[72]

And as Judge Hersch Lauterpacht explained in his separate opinion in the *Norwegian Loans* case:

> "National legislation . . . may be contrary, in its intentions or effects, to the international obligations of the State. The question of conformity of national legislation with international law is a matter of international law."[73]

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[71] Counter-Memorial, paras. 76 *et seq.* and para. 91, footnote 96.

[72] *Exchange of Greek and Turkish Populations, Advisory Opinion, P.C.I.J., Series. B, No. 10*, at p. 20. Official translation. The authentic French text reads: *"Mais cette clause ne fait que mettre en relief un principe allant de soi, d'après lequel un Etat qui a valablement contracté des obligations internationales est tenu d'apporter à sa législation les modifications nécessaires pour assurer l'exécution des engagements pris."*

[73] Case of *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 9, separate opinion, Lauterpacht, at p. 37.

12. The present case, Mr. President, is not about US law as such. Domestic law constitutes for international law nothing but facts. In the famous wording of the judgment of the Permanent Court of International Justice on *Certain German Interests in Polish Upper Silesia*:

> "From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such, but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany . . ."[74]

That is exactly what Germany requests the Court to do, Mr. President. We do not ask the Court to interpret US law as such, but we invite the Court to give a judgment on the question of whether, in applying its own law, the United States acted in conformity with its obligations towards Germany under Article 36 of the Vienna Convention on Consular Relations. Germany submits that it did not.

13. To put it briefly, Mr. President, US law prevents raising the violation of the notification requirement in appellate proceedings after a conviction. That is the heart of the matter: once a violation of Article 36 has occurred, and the defendant has not raised the violation of his rights before the trial court, there is no opportunity to review the impact of the violation on the judgment handed down while the defendant did not know of his rights. Thus, US law creates a vicious circle: the defendant cannot raise the violation of his rights under Article 36, because he does not know of this right, but the failure of the authorities to inform the detainee of his rights cannot be remedied in later proceedings, because US domestic law will prevent its courts from even looking at this matter.

14. Two institutions of US law — established for entirely different purposes — lead to this result: first, the doctrine of procedural default which applies in many state and in all federal appeals and *habeas corpus* proceedings, and, second, the Antiterrorism and Effective Death Penalty Act of 1996. Under the doctrine of procedural default, a defendant cannot raise any mistake made in the trial proceedings on appeal if he did not do so already in the jury trial. While

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[74] *P.C.I.J., Series A, No. 7*, at p. 19. In the authentic French text: "*Au regard du droit international et de la Cour qui en est l'organe, les lois nationales sont de simples faits, manifestations de la volonté et de l'activité des États, au même titre que les décisions judiciaires ou les mesures administratives. La Cour n'est certainement pas appelée à interpréter la loi polonaise comme telle; mais rien ne s'oppose à ce qu'elle se prononce sur la question de savoir si, en appliquant ladite loi, la Pologne agit ou non en conformité avec les obligations que la Convention de Genève lui impose envers l'Allemagne.*"

this rule does make sense where it concerns rights of which the defendant or his attorney were aware, it has perverse consequences when applied to a right to be informed of another right. A right to information, like that contained in Article 36, subparagraph 1 *(b)*, of the Vienna Convention, serves to remedy the ignorance of a detainee. If this obligation to inform is not met, the detainee will not know of this right, neither will he be able to raise this failure before the trial court. In this case, in contrast to other procedural rights, the right to information can only be properly enforced if it can still be raised after the end of the first trial. A measure or rule entirely justified in cases where his rights are known to the defendant amounts to an impermissible denial of rights in cases of a right to information. Germany does not claim that US courts contemplated such a result when they introduced the doctrine of procedural default. But this does not remedy the catastrophic consequences of the doctrine for the right to information. As Douglass Cassel has put it:

> "To bar a late claim under the Convention as procedurally defaulted, when consular rights could have been timely asserted, had the state complied with its duty to advise the foreign national of his consular rights 'without delay', is to penalize the foreign national for the state's breach. It is no answer to blame the defense counsel. If the state had complied with its duty to advise, the defense counsel's oversight would not have mattered."

> And further:

> "If the US had done its duty . . . [the foreign national] would have been in a position to assert his consular rights at the right time and place. By allowing . . . restrictions on *habeas corpus* or considerations of domestic federalism to thwart Convention claims, the US fails to give 'full effect' to the purposes of consular rights."[75]

15. In addition, instead of creating incentives for the State authorities to meet their obligations under Article 36, the doctrine of procedural default provides a shield for State authorities. When the authorities meet their obligation to inform the detainees of their rights, they could face a much better informed defendant and might lose a case they might otherwise have won. On the other hand, if they fail to meet their obligation, they do not even risk condemnation by a higher court. Mr. President, distinguished Members of the Court, this state of affairs cannot be regarded as effective implementation of Article 36.

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[75] D. Cassel, Judicial Remedies for Treaty Violations in Criminal Cases: Consular Rights of Foreign Nationals in United States Death Penalty Cases, 12 *LJIL* (1999) 851, at p. 885.

16. The adoption of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[76], has made it even more difficult to challenge a State conviction. A *habeas* petitioner alleging that he is held in violation of treaty law will not even be granted an evidentiary hearing to establish prejudice[77]. Thus, in the *Breard* case, the US Supreme Court referred to the first phrase of Article 36, paragraph 2, only — apparently disregarding the second phrase — and applied the domestic rules of procedural default and the AEDPA to justify its refusal to deal substantively with Breard's claim of a violation of Article 36[78].

17. In the case of the LaGrand brothers, both the procedural default rule and the application of the said act prevented federal courts, indeed, any court, from actually dealing with the question of whether lack of consular notification had vitiated the pronouncement of the death penalty. The jurisprudence described earlier made it impossible for the LaGrand brothers to effectively raise the issue of the lack of consular notification after they had at last learned of their rights and established contact with the German consulate in Los Angeles in 1992. On 16 January 1998, the US Court of Appeals for the 9th Circuit held that the claim of violation of the Vienna Convention was procedurally defaulted, even though the violation itself was not in dispute[79]. The court did not even discuss the substantive argument to the effect that additional mitigation might have prevented the pronouncement of the death penalty.

18. Mr. President, the application of the procedural default rule in the *LaGrand* case constitutes no exception but rather confirms the rule of the non-enforcement of Article 36, by US courts. Regrettably, the US Counter-Memorial is correct in stating that the trend visible in the first *Lombera-Camorlinga* decision of the 9th Circuit Court at the time when the German Memorial was written has not been continued. Recent judgments and scholarly analysis show that there is unlikely to be a change of the jurisprudence on the matter without a change in US federal law[80],

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[76] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[77] 28 U.S.C., paras. 2254 *(a)*, *(e)* (2) (ii) (Supp. 1998); for the text see Memorial, footnote 188 to para. 4.34.

[78] *Breard*, 37 *International Legal Materials* 826, 828 (1998).

[79] *LaGrand* v. *Stewart*, 133 F.3d 1253, 1261 (9th Cir. 1998), Memorial, Ann. 10.

[80] See, e.g., E. Luna/D. Sylvester, Beyond Breard, 17 Berkeley Journal of International Law (1999) 147; H. Schiffman, Breard and Beyond: The Status of Consular Notification and Access under the Vienna Convention, 8 Cardozo J. Int'l & Comp. L. (2000) 27.

even though some commentators maintain that such a change might still come about[81]. However, in the present context what counts is not whether the US court decisions are or are not correct from the standpoint of domestic US law. And so far it is for the United States to decide how to implement Article 36. But such implementation must meet the minimum standard of effectiveness required by Article 36, paragraph 2. As Germany has shown, these requirements are not met by the way in which the US legal system currently deals with violations of Article 36. In the words of Judge Boochever's vigorous dissent to the decision of the full 9th Circuit Court in *Lombera-Camorlinga*, the interpretation of the Vienna Convention by the majority of US courts

> "is equivalent to securing enforcement by a toothless, clawless lion. Defendants who actually have been prejudiced by the failure to be notified of their Article 36 rights may suffer imprisonment and other punishments to which they would not have been subjected had their rights been observed. Such an interpretation of the treaty hardly conforms to the due process principles embodied in the United States Constitution.[82]"

Neither, one might add, do they conform to the Convention itself. However, regrettably, Judge Boochever's is not the dominant position of the US judiciary. A violation of Article 36, especially the failure of US authorities to inform the foreign national of his rights, cannot be effectively remedied before US courts — or, indeed, anywhere else. This is — as our case shows — bound to lead to fatal consequences when the death penalty is imposed.

19. Mr. President, we will later set out the safeguards Germany seeks in order to remedy that situation. In addition, Mr. Donovan will explain to you how informing the consulate earlier would have affected the judgment, especially the pronouncement of the death penalty. However, one thing is crystal clear already at this point: the purpose of Article 36, that is, to inform the foreign detainee of his rights under the Convention, cannot be fulfilled if the possibility of raising the lack of notification is limited to the original trial. That is where US law is defective from the standpoint of Article 36, especially regarding the requirement of paragraph 2. Thus, Germany agrees with the opinion of Keith Highet, who wrote shortly before his death:

> "The purposes of consular access rights are quite obviously to protect the criminal defendant nationals. To cut off the right of appeal on the basis of failure to raise the question of lack of consular access under the Convention in state court, when notification of such consular access was the duty of the arresting (receiving) State and

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[81] Schiffman, *ibid.*, at pp. 58 *et seq.* D. Cassel, Judicial Remedies for Treaty Violations in Criminal Cases: Consular Rights of Foreign Nations in United States Death Penalty Cases, 12 *Leiden JIL* (1999) 851, at pp. 884 *et seq.*

[82] United States Counter-Memorial, Ann. 9, p. 5.

> was not in fact performed, is as absurd as Catch-22 but not in the least amusing. It is in fact the precise *opposite* of the performance of the duty to 'enable full effect to be given to the purposes for which the rights accorded under this article are intended'."[83]

The case before you provides a unique opportunity to ensure the effective performance of that duty by the United States in the future.

20. Mr. President, distinguished Members of the Court, I would now kindly ask you to call upon Professor Simma to demonstrate that Article 36 contains individual rights. Thank you for your attention.

Le PRESIDENT : Je vous remercie, M. Paulus. Je donne maintenant la parole au professeur Bruno Simma.

M. SIMMA : Merci M. le président. Monsieur le président, j'aimerais commencer avec une remarque de nature procédurale. Nous sommes un peu en retard et je vous demande de bien vouloir m'interrompre quand vous souhaiterez que la Cour suspende la procédure jusqu'à la séance de l'après-midi. Merci, Monsieur le président.

VI. ARTICLE 36 OF THE VIENNA CONVENTION AS AN INDIVIDUAL AND HUMAN RIGHT

1. Mr President, Members of the Court, in the following, I will demonstrate that the right to information under Article 36 of the Vienna Convention constitutes an individual, indeed, a human right, and explain why this is not only a factor aggravating the violations which have occurred, but also brings into play specific procedural safeguards in death penalty cases. Further, I will deal with the relevance of other human rights for the right to consular assistance: and in concluding this part, I will show the impact of the character of Article 36 as a human right on the present case.

1. Article 36 contains individual rights

2. In paragraph 97 of its Counter-Memorial, the United States argues that Article 36 does not confer rights on individual foreign nationals but only on their home State. Germany will argue that the right to information contained in Article 36, subparagraph 1 *(b)*, constitutes an individual right of foreign nationals. But, of course, Germany agrees with the United States, that, regardless of the

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[83] K. Highet, The Emperor's New Clothes: Death Row Appeals to the World Court? The *Breard* Case As a Miscarriage of (International) Justice, in: *In Memoriam Judge José Maria Ruda*, manuscript, p. 6, German Memorial, Ann. 39.

status of Article 36, paragraph 1, as an individual right of foreigners, it also establishes a right for a State party to the Convention to see this provision respected. Consequently, all the conclusions Germany has drawn, and will draw, from the violation of Article 36 are valid independently of the question whether Article 36 provides individual rights to foreign nationals in addition to rights for States parties.

3. Mr. President, the understanding of the rights under Article 36 as individual rights is confirmed by all the rules on interpretation of international treaties that we find in Article 31 of the Vienna Convention on the Law of Treaties. First, it should be clear enough that the "ordinary meaning" of the words "his rights" used in Article 36, subparagraph 1 *(b)*, refers to an individual person. Second, the context of Article 36 relates to both the concerns of sending and receiving States and those of individuals. It is individuals who are accorded freedom with respect to communication in subparagraph 1 *(a)*, it is individuals who have the right to request or not request the notification of the consulate pursuant to subparagraph 1 *(b)*, it is individuals who are to be informed of that right and, lastly, it is individuals who have the right to oppose a prison visit according to subparagraph 1 *(c)*. The *chapeau* of Article 36 which links those rights to the consular function does not change this picture. Nor does the paragraph in the Preamble to the Convention which provides that

> "the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective states".

What this paragraph clearly deals with, Mr. President, is "privileges and immunities" of consular personnel, a matter wholly unrelated to Article 36. It was intended to ensure that consular personnel would observe its obligations towards the receiving State and that, if necessary, consular privileges could be waived by the sending State. This has nothing to do with Article 36. Third, the purpose of Article 36, paragraph 1, is to give individuals the right to inform their consulate or to abstain from so doing. Can there be a clearer indication of an individual right than the placing of its exercise squarely into the hands of the individual? To conclude our textual analysis, it is difficult to see, Mr. President, why something which looks like an individual right, feels like an individual right and smells like an individual right should be anything else but an individual right. As this Court has explained in its Advisory Opinions first in the *Arbitral Award of 31 July 1989* case and on the *Competence of the General Assembly for the Admission of a State to the United Nations* case: "If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."[84]

4. But there is still more evidence. An analysis of the drafting history of our provision reveals that it was not introduced through some sleight of hand. On the contrary, it embodies the carefully considered solution to a problem which had occupied the participants of the Vienna Conference for a long time. On the one hand, they intended to do everything to render Article 36 effective. On the other, they did not want to have the consulate informed if a foreigner did not wish so: and the solution to this problem was the individual right to information on the right to notification. In our Memorial, we quote several State representatives who shared that view[85], and the one or two sources which the US Counter-Memorial adduces against this interpretation[86] are either not to the point or not representative.

5. Thus, the receiving State is under an obligation to inform the detainee, without delay, of his right — a genuine right — to have the authorities or himself inform the consulate of his arrest or detention. At a previous occasion before this Court, the Respondent had no doubt about this. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, the United States pleaded that Article 36 contained an individual right, and let me quote from the Memorial in this case:

> "Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others."[87]

The US Foreign Affairs Manual also speaks "of the arrestee's right to communicate with the American consul"[88]. Germany agrees, Mr. President. Language, context and purpose of Article 36 make this conclusion imperative.

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[84] *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at 8. The authentic French text reads: *"Si les mots pertinents, lorsqu'on leur attribue leur signification naturelle et ordinaire, ont un sens dans leur contexte, l'examen doit s'arrêter là."* Confirmed in the case concerning the *Arbitral Award of 31 July 1989, I.C.J. Reports 1991*, p. 53, at p. 72.

[85] Memorial, paras. 4.101 *et seq.*

[86] Counter-Memorial, para. 100.

[87] *I.C.J. Reports 1980*, p. 174.

[88] Section 7 FAM 411.1, Ann. MG 59, at p. 1284.

6. Now, in the opinion of the United States, 20 years after the *Tehran* Judgment, "even if Article 36 in some sense establishes individual rights, there is no requirement that those rights be justiciable in national criminal justice systems": thus the Counter-Memorial. But Article 36, paragraph 2, clearly requires domestic law to protect the individual right of foreigners to be informed on their right to consular notification in an effective manner. It is difficult to imagine, Mr. President, how this task could be achieved otherwise than by providing a right the violation of which entails legal consequences in domestic law. Hence, Germany takes the view that Article 36, paragraph 2, requires the recognition of the right of an individual to seek remedies for the violations of the Vienna Convention. And in light of what Mr. Paulus just said, Article 36, paragraph 2, further obliges States to refrain from imposing any procedural bar or penalty for the failure to assert such a right prior to the time they provided the required notification.

II. Article 36 as a human right

7. Mr. President, Germany further submits that, in the light of the development of international human rights law subsequent to the conclusion of the Vienna Convention in 1963, Article 36 has assumed the character of a human right pertaining to foreigners. As a preliminary point in this regard, I will recall the principle of dynamic treaty interpretation. And secondly, I will turn to the substance of my argument.

1. The principle of dynamic treaty interpretation

8. Mr. President, the Vienna Convention on the Law of Treaties provides in Article 31, subparagraph 3 *(c)*, that, together with the context of a treaty provision, "any relevant rules of international law applicable in the relations between the parties" shall be taken into account. Regarding human rights of foreigners, both Germany and the United States are parties to the International Covenant on Civil and Political Rights which prescribes due process of the law, in particular in connection with the application of the death penalty. In addition, numerous documents on the individual rights of foreigners, which expressly include the right under Article 36 of the Consular Convention, have been agreed upon in the United Nations. I will return to these texts in a moment, or maybe in the afternoon.

9. Further, Mr. President, the Consular Convention is a living instrument, which must be interpreted in the light of subsequent developments of international law. As this Court pronounced in its *Namibia* Advisory Opinion, referring to a League of Nations Mandate,

> "the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[89]

More recently, this Court has confirmed this view in its Judgment in the *Gabčíkovo-Nagymaros* case, regarding the impact of the development of international environmental law on the interpretation of a bilateral treaty[90]. There can be no doubt in my view, that such necessity of dynamic interpretation also applies to the field of human rights.

10. Indeed, where human rights are at stake, these considerations are even more imperative. Both the European Court of Human Rights and the Inter-American Court of Human Rights have interpreted human rights treaties in a dynamic fashion. In the words of the Advisory Opinion of the Inter-American Court of Human Rights of 1 October of last year, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, the guidance of the *Namibia* Opinion is:

> "particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court . . . [that is the Inter-American Court] and the European Court of Human Rights . . ., among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions."[91]

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[89] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53.

[90] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, paras. 139 f.

[91] Inter-American Court of Human Rights, Advisory Opinion OC-16/1999, para. 114, as submitted by Germany to the Court; citing IACHR, *Interpretation of the American Declaration of the Rights and Duties of Man*, Advisory Opinion OC-10/89 of 14 July 1989, Series A No. 10, para. 43; Cour Européenne, *Tyrer* v. *UK*, Judgment of 25 April 1978, Series A No. 26, pp. 15-16, para. 31; *Marckx*, Judgment of 13 June 1979, Series A No. 31, p. 19, para. 41; *Loizidou* v. *Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A No. 310, p. 26, para. 71.

In the context of the interpretation of the obligation to inform a detainee "without delay", the Inter-American Court has also emphasized the role of the principle to give *"effet utile"*, "appropriate effect", to the provisions of a treaty to ensure that it is implemented effectively[92].

11. And this is even more appropriate in the case now before you, Mr. President, because, as far as Article 36 of the Consular Convention is concerned, the subsequent developments that I have described do not change an established interpretation. Rather they confirm the textual understanding of our provision. Mr. President, Germany will now show that the subsequent development of international human rights law further strengthens the character of Article 36 as establishing an individual right.

2. Further development of the human rights of foreigners

12. First, in 1985, a "Declaration on the human rights of individuals who are not nationals of the country in which they live"[93] was adopted by the United Nations General Assembly by consensus. Among the rights mentioned therein, one can find, in Article 10, the provision that

> "[a]ny alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in the absence thereof, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides".

Thus, according to this Declaration, the right of access to the consulate of the home State, as well as the information on this right, is a human right of "any individual who is not a national of the State in which he or she is present"[94].

13. There exist several other declarations and documents which also recognize the right to consular assistance as a human right. These documents include Paragraph 16.2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment approved by the General Assembly in 1988, Rule 65 of the Rules of Detention of the International Criminal Tribunal for the Former Yugoslavia — contained by the way in a chapter on "individual

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[92] Advisory Opinion OC-16/99, para. 104.

[93] Annex to resolution 40/144.

[94] *Ibid.*, Art. 1.

rights of detainees"[95] — and, most recently, Paragraph 3 of Resolution 2000/65 of the United Nations Commission on Human Rights of 27 April of this year on the question of the death penalty[96].

14. Finally, a year ago, the Inter-American Court of Human Rights has expressed the view that

> "[t]he bearer of the right mentioned ... is the individual. In effect, this article is unequivocal in stating that rights to consular information and notification are 'accorded' to the interested person."[97]

All American States appearing before the Court in this instance — El Salvador, Mexico, Guatemala, the Dominican Republic, Paraguay, and Costa Rica — shared this interpretation with the lone exception of the United States, which was, at the time, already a party to the present proceedings[98]. And, as the Counter-Memorial has to admit, even the jurisprudence of US courts does not explicitly deny that Article 36 embodies an individual right. Hence, Mr. President, Germany considers that there is overwhelming evidence that Article 36 constitutes an individual right of foreign nationals and is to be regarded as a human right of aliens.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Je crois que nous allons nous arrêter là pour ce matin. La Cour reprendra ses travaux cet après-midi à 15 heures.

L'audience est levée à 13 heures.

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[95] Complete name *Rules governing the detention of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, as amended on 17 Nov. 1997, IT/38/REV.7, Rule 65.

[96] United Nations Doc. E/CN.4/RES/2000/65, para. 3 *(d)*: The Commission on Human Rights urges "all States that still maintain the death penalty: ... *(d)* to observe the Safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under the Vienna Convention on Consular Relations".

[97] Advisory Opinion OC-16/1999, para. 82.

[98] *Ibid.*, paras. 26 *et seq.*

CR 2000/27

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2000

Public sitting

held on Monday 13 November 2000, at 3 p.m., at the Peace Palace,

President Guillaume presiding

in the LaGrand Case
(Germany v. United States of America)

VERBATIM RECORD

ANNÉE 2000

Audience publique

tenue le lundi 13 novembre 2000, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président

en l'affaire LaGrand
(Allemagne c. Etats Unis d'Amérique)

COMPTE RENDU

Present:	**President**	**Guillaume**
	Vice-President	**Shi**
	Judges	**Oda**
		Bedjaoui
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
	Registrar	**Couvreur**

The Government of the Federal Republic of Germany is represented by:

Mr. Gerhard Westdickenberg, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Eberhard U. B. von Puttkamer, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Bruno Simma, Professor of Public International Law at the University of Munich,

as Co-Agent and Counsel;

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and at the European University Institute in Florence,

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Hans-Peter Kaul, Head of the Public International Law Division, Federal Foreign Office,

Dr. Daniel Khan, University of Munich,

Dr. Andreas Paulus, University of Munich,

as Counsel;

Dr. Eberhard Desch, Federal Ministry of Justice,

Dr. S. Johannes Trommer, Embassy of the Federal Republic of Germany in the Netherlands,

Mr. Andreas Götze, Federal Foreign Office,

as Adviser;

Ms Fiona Sneddon,

as Assistant.

The Government of the United States of America is represented by:

Mr. James H. Thessin, Acting Legal Adviser, United States Department of State,

as Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

as Deputy Agents;

The Honourable Janet Napolitano, Attorney-General, State of Arizona,

Professor Michael J. Matheson, Professor of International Law, School of Advanced International Studies, Johns Hopkins University; former Acting Legal Adviser, United States Department of State,

Professor Theodor Meron, Counsellor on International Law, United States Department of State; Charles L. Denison Professor of International Law, New York University; Associate Member of the Institute of International Law,

Professor Stefan Trechsel, Professor of Criminal Law and Procedure, University of Zurich Faculty of Law,

as Counsel and Advocates;

Professor Shabtai Rosenne, Member of the Israel Bar; Honorary Member of the American Society of International Law; Member of the Institute of International Law,

Ms Norma B. Martens, Assistant Attorney-General, State of Arizona,

Mr. Paul J. McMurdie, Assistant Attorney-General, State of Arizona,

Mr. Robert J. Erickson, Principal Deputy Chief, Appellate Section, Criminal Division, United States Department of Justice,

Mr. Allen S. Weiner, Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

Ms Jessica R. Holmes, Attaché, Office of the Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

as Counsel.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et je donne immédiatement la parole au professeur Bruno Simma pour la République fédérale d'Allemagne.

M. SIMMA : Merci, Monsieur le président. Mr. President, before the lunch break I was developing the argument that the right enshrined in Article 36 is an individual right and has, as it were, grown into a human right due to the development of international human rights law around the Consular Convention: and I would like to continue my argument by turning to the incidence of specific human rights on the *LaGrand* case.

III. Incidence of specific human rights on the *LaGrand* case

15. The human rights standards applicable between the United States and Germany shed further light on the implications of Article 36 in the context of pronouncements of the death penalty following a violation of Article 36. According to Article 5 of the 1985 General Assembly Declaration that I mentioned in the morning:

> "[a]liens shall enjoy . . . *(a)* The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law."

The right to consular notification under Article 36 of the Vienna Convention constitutes, without doubt, a "procedure established by law" in the sense of this provision. For the analysis of the impact of the violation of Article 36, the procedural safeguards relating to the death penalty are therefore of particular importance.

16. In the case at hand, the International Covenant on Civil and Political Rights is undoubtedly the most important source of the human rights of foreigners in domestic trials. As already mentioned, both Germany and the United States are parties to the Covenant[1]. Therefore, the Covenant constitutes a set of rules "of international law applicable in the relations between the parties" for the purpose of interpretation of Article 36.

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[1] Germany has ratified the Covenant on 17 December 1973, the United States on 8 June 1992.

1. The ICCPR and the human rights of aliens in death penalty cases

17. Let me recall the text of the relevant provisions of the Covenant. According to Article 14,

> "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Article 6 provides, *inter alia*,

> "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime . . ."

Article 2, paragraph 2, of the Covenant obliges the States parties, *inter alia*, "to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant".

Mr. President, the provisions I have just quoted, are interrelated. Article 6 requires special procedural guarantees in cases involving the death penalty, and Article 14 sets standards for due process of the law. The Human Rights Committee of the United Nations has emphasized in several cases that "the law in force" referred to in Article 6, paragraph 2, on the right to life includes not only substantive, but also procedural guarantees[2]. This has also been confirmed by the Committee's General Comment on Article 6[3]: and Article 2 of the Covenant is designed to render its rights effective within the legal systems of States parties.

18. Now, the rights under Article 36 of the Consular Convention help to ensure that the foreign national is on an equal footing with nationals of the host country. In this regard, the following explanation given by the Inter-American Court of Human Rights one year ago is of importance:

> "[T]he real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of

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[2] *Mbenge*, Communication No. 16/1977 (1983), para. 17; *Reid* v. *Jamaica*, No. 250/1987, *Human Rights Law Journal 11* (1990), No. 3-4, p. 321, para. 11.5; *Wright* v. *Jamaica*, *Human Rights Law Journal 13* (1992), p. 351, para. 8.7.

[3] General Comment on Article 6, adopted at the 16th Session 1982, para. 7.

> defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person."[4]

And the Court was therefore of the opinion that

> "the individual's right to information, conferred in Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, . . . makes it possible for the right to the due process of law . . . to have practical effects in tangible cases . . ."[5].

19. Therefore, Mr. President, the development of human rights law strengthens Germany's argument that Article 36 has always been, and continues to be, an individual right with strong human rights dimensions because it concerns guarantees of due process.

2. Article 36, the right to life, and the death penalty

20. Mr. President, distinguished Members of the Court, I have already referred to the importance in our case of the right to life. As Germany has emphasized from the beginning, the present case does not concern the international legality *vel non* of the death penalty as such. However, that does not mean that the death penalty is of no significance to violations of Article 36 by the US authorities in our case. On the contrary, the character of Article 36 as a guarantee of due process in the sense of the Covenant on Civil and Political Rights means that, if followed by an execution, a violation of Article 36 will also amount to a violation of the right to life enshrined in Article 6 of the Covenant. In this sense, the Human Rights Committee observed in the case *Lynden Champagnie* v. *Jamaica*,

> "the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant"[6].

21. In cases involving the death penalty, Article 6 requires that procedural guarantees such as Article 36 must be respected even more scrupulously than in other circumstances. The death penalty is a very particular form of punishment. As the US Supreme Court put it:

> "[D]eath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality . . . From the point of view of society, the action of the

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[4] Advisory Opinion OC-16/1999, para. 121.

[5] *Ibid.*, para. 124.

[6] *Lynden Champagnie et al.* v. *Jamaica*, Communication No. 445/1991, 2 International Human Rights Reports (1995) 102, at 106, para. 7.4.

> sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action."[7]

The Inter-American Court of Human Rights, the European Court of Human Rights and the international human rights supervisory bodies all share this view. There is not only a difference in the magnitude of the punishment but also a difference in kind: whereas some kind of restitution is possible in all criminal cases not leading to an execution, "death is different" because it is not remediable. Mr. President, Members of the Court, as you did not fail to notice in your Order of 3 March 1999, the execution of Walter LaGrand turned out to cause "irreparable harm to the rights claimed by Germany in this particular case"[8].

22. Thus, a violation of Article 36 in the context of a traffic accident or visa questions — as deplorable as it may be — is different from a violation of Article 36 in proceedings leading to the execution of a defendant. In the words of the Inter-American Court of Human Rights,

> "[i]t is obvious that the obligation to observe the right to information becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive. If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life."[9]

The observance of Article 36 in death penalty cases is a question of life and death. Therefore, the pronouncement of the death penalty demands the strictest possible respect for all procedural safeguards, including Article 36. And to quote once again the Inter-American Court:

> "[N]on observance of a detained foreign national's right to information, recognized in Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be 'arbitrarily' deprived of one's life, in the terms of the relevant provisions of the human rights treaties with the juridical consequences inherent in any violation of this nature, i.e., those pertaining to the international responsibility of the State and the duty to make reparations."[10]

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[7] *Gardner* v. *Florida*, 430 U.S. 349, 357-58 (1977) (citations omitted) (plurality opinion); *Ohio Adult Parole Authority* v. *Woodard*, 118 S.Ct. 1244, 1256 (1998) (J. Stevens, dissenting).

[8] *LaGrand Case (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9, para. 24.

[9] Advisory Opinion OC-16/1999, para. 135.

[10] *Ibid.*, para. 131.

3. Consequences

23. Mr. President, Germany therefore submits that the impact of the individual and human rights aspects of the rights under Article 36 of the Vienna Convention is threefold: first, since the breach of Article 36 by the United States did not only infringe upon the rights of Germany as a State party to the Convention but also entailed a violation of the individual rights of the LaGrand brothers, Germany is entitled to bring a claim in pursuance of diplomatic protection of its nationals. Second, the character of the right under Article 36 as a human right renders the effectiveness of this provision even more imperative. Thus, and third, effective enforcement of Article 36 before domestic courts requires that the United States recognize the right of foreigners to seek remedies for violations of the Vienna Convention and that United States law refrain from imposing any procedural bar or penalty for the failure to assert such a right prior to the time the United States provided the required notification.

IV. Conclusion

24. In conclusion, Mr. President, let me summarize the German claims concerning the violations of the Vienna Convention on Consular Relations by the United States:

— By not informing Karl and Walter LaGrand without delay of their rights to consular notification, the United States has violated Article 36, subparagraph 1 *(b)*, of the Vienna Convention.

— By thus violating the requirement of Article 36, subparagraph 1 *(b)*, the United States has also violated Article 36, subparagraph (1) *(a)* and *(c)*, because it rendered the exercise of consular communication between Germany and its nationals impossible.

— By applying rules of its domestic law, in particular the rule of procedural default and the Antiterrorism and Effective Death Penalty Act barring the LaGrand brothers from raising the violation of their rights, the United States has also violated Article 36, subparagraph 2, of the Vienna Convention.

— Based on these violations of the individual rights of its citizens, Germany brings this case not only in its own right, but also in the exercise of its right to diplomatic protection of nationals.

25. Mr. President, distinguished Members of the Court, this brings me to the end of Germany's presentation on this issue. Thank you very much for your courtesy and attention and I would now like you to call upon Mr. Donovan to expose our arguments on causation and prejudice.

Le PRESIDENT : Je vous remercie, Monsieur le professeur, et je donne maintenant la parole à M. Donovan.

Mr. DONOVAN:

VII. PREJUDICE AND CAUSATION

1. Mr. President, distinguished Members of the Court, while it is a privilege to appear again before the Court, I regret the circumstances that bring the United States and Germany here. As Dr. Westdickenberg said this morning, the conduct of which the LaGrand were convicted can only be deeply, deeply deplored and the suffering it caused deeply, deeply regretted. The crime and punishment are never pretty and the underlying circumstances of this case cannot distract us from the important issues of international law to which the conviction and sentence of the LaGrand brothers give rise. I will address the United States suggestion that Germany has failed to show that the acknowledged violations of the Vienna Convention in the cases of Karl and Walter LaGrand had any consequences. Specifically, the United States suggests that Germany's claims about the impact that consular assistance would have had are, in the United States words, "speculative and unjustified" — that they are merely, again in the United States words, "suppositions about what might have occurred had the LaGrand brothers been properly informed" of their consular notification rights[11]. In short, according to the United States, the violations made no difference.

2. To show the contrary, I will proceed in three steps. First, I will set out the evidentiary circumstances in which Germany brings this case and propose how the Court should take account of those circumstances in making any factual determinations that may be required.

3. Second, I will review the evidence submitted by Germany, which shows compellingly that — exactly as the drafters of the Vienna Convention, no less than its signatory States,

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[11] Counter-Memorial, paras. 24-45.

supposed — there is every reason to believe that consular notification would have made a difference in these cases.

4. Finally, I will add a few words about the particular circumstances in which the Vienna Convention violations under review arose — that is, in a capital case, where the life of the sending State's nationals was at stake.

5. I would like to start however by making a preliminary point. The United States suggests in Chapter IV of its counter-statement of the facts that compliance with its consular notification obligations would not have changed the fate of the LaGrand brothers. However, it draws no legal consequences from that point. Hence, as the Parties have framed the issues for this Court, the United States does not rely on any alleged lack of causation or any alleged absence of prejudice as a basis to reject any one of Germany's four submissions. Hence, conversely, the Court need make no factual determinations on any such issues. Notwithstanding that preliminary point, Germany addresses the United States suggestion that the violations had no impact, because the consequences of the violations here help to illustrate the content and importance of the consular notification rights at stake.

6. I turn, then, to the evidentiary context. Germany respectfully submits that, should the Court find it necessary to determine any disputed facts, the Court should make those determinations in the light of two concrete evidentiary obstacles faced by Germany as a result of the United States actions.

7. First, at the risk of stating the obvious, if there is any issue of causation in the case, it arises because the United States failed to comply with its consular notification obligations under the Vienna Convention. When the United States tries to disparage Germany's factual showing as "speculation" and "supposition", it ignores the obvious reality that Germany must argue about what "would" have happened instead of what "did" happen precisely because, due to the United States violation, Germany has been deprived of a historical record of an actual event. In other words, it is the United States own conduct that forces Germany to argue about what would have been, what should have been, instead of what was. Here, moreover, the long passage of time since the relevant events — again, the result of the United States violation — exacerbates the obstacles faced by Germany in obtaining relevant evidence.

8. Whether the point is treated as a rule of evidence or a general principle of estoppel, the United States should not be permitted to reap an advantage of any kind from its own violation. It follows that, at a minimum, Germany's showing as to the consequences of the United States violation must be evaluated in light of the intrinsic constraints on a party's ability to reconstruct a putative chain of events, particularly after such a lengthy period of time. Indeed, if any showing of causation is required, the circumstances here would make it appropriate for the Court to, first, presume causation, and second, require the United States to overcome the presumption with proof that its violations could not have affected the conviction or sentence.

9. Second, and even more compellingly, the United States has here, again by its own actions, deprived Germany of its best source of evidence on issues concerning what the LaGrands would have done had they been advised of their consular notification rights — and that evidence, of course, would have been Karl and Walter LaGrand themselves. Though Karl LaGrand was executed before this Court issued its Order of provisional measures, it remains the case that Germany does not have access to his testimony because he was executed. Thus, for purposes of these proceedings, as between Germany and the United States, it should be the United States that suffers any adverse consequences from his absence, and Germany is entitled to a ruling protecting it against any evidentiary prejudice it might suffer as a result of that absence.

10. Of course, Germany's entitlement to a protective ruling in the case of Walter LaGrand is even clearer, because as this Court knows, he was executed in direct defiance of the Court's Order of provisional measures.

11. Both under its own Rules and as a matter of its inherent jurisdiction, this Court surely has authority to determine the means by which it will determine disputed facts[12]. This authority

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[12] For example, Statute of the International Court of Justice, Arts. 48-49; I.C.J. Rules of Court, Art. 62; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253, para. 23; Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-1954: Questions of Jurisdiction, Competence and Procedure, 1958 Brit. Y. B. Int'l L. 117 & n.1; see also *Conditional Request of the Republic of Paraguay for an Order Conclusively Establishing Facts* (9 October 1998), case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*, paras. 5.49-5.50.

includes the authority to make conclusive findings when a party deprives the Court of relevant evidence by refusing to provide it or, as here, preventing the adverse party from doing so[13].

12. The Court should apply that principle here. Whether as a sanction for violating the Order of provisional measures, or as a matter of the Court's inherent authority, the Court should protect Germany from any evidentiary prejudice caused by the LaGrands' execution by deeming any contested issues as to which their testimony might have been relevant as determined in Germany's favour.

13. As it happens, however, Germany needs no such evidentiary rulings here. I therefore proceed to my second point. On the present record it is abundantly clear that material harm to both Germany and its nationals was caused by the failure of consular notification in the case of Karl and Walter LaGrand.

14. The most compelling example is in the utterly ineffective case in mitigation presented on behalf of the LaGrands. As Germany has explained in its Memorial, a defendant's affirmative case in mitigation is a critical part of a defence against the death penalty[14]. As the mitigation expert whose declaration is included in Germany's annexes explains, the only way to develop a case in mitigation is by first assembling an in-depth and comprehensive social history from reliable independent sources[15]. As the expert further states, specifically with respect to Walter LaGrand, "no such history was ever prepared, nor was any meaningful investigation conducted", notwithstanding "obvious indicators of truly significant" mitigating factors, including "a violent and chaotic childhood", "cultural and racial isolation", and "documented early neglect so profound that the LaGrand children were repeatedly hospitalized for malnutrition and criminal charges filed against their caretaker"[16]. That evaluation by the expert with respect to Walter's case is echoed by the affidavit by Karl's attorney that was quoted this morning, which indicate that no such attempt at

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[13] Sir Gerald Fitzmaurice, *supra* n. 2, at p. 151; Gilbert Guillaume, "Preuves et mesures d'instruction", in *La juridiction internationale permanente: colloque de Lyon* (1987), p. 196. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, separate opinion of Judge Shahabuddeen, I.C.J. Reports 1993*, p. 368 (1993) (citing E. Dumbauld, *Interim Measures of Protection in International Controversies* 161 (1932)).

[14] Memorial, paras. 4.61-4.67.

[15] Holdman Decl., paras. 7-13, Memorial, Ann. pp. 1104-1106.

[16] Holdman Decl., para. 13, Memorial, Ann. pp. 1106-1107; see also Henry Aff. 2-6, Memorial, Ann. pp. 1215-1216; Hirsh Aff. paras. 9-13, Memorial, Ann. pp. 1113-1115).

the foundation of a mitigation case was made on Karl's behalf either. A comparison of the expert's description in the affidavit before the Court of what a professional case in mitigation would have looked like with the transcript of the aggravation-mitigation hearing in the LaGrands' case — which is also before the Court — graphically illustrates the shortcomings of their sentencing-phase defence[17].

15. What would have happened had German consular officials been able to assist earlier is best demonstrated by what did happen after they were consulted. Germany has had no opportunity to investigate the document that was presented before the Court today concerning a different case, but no matter what the circumstances presented by that other case it cannot be convincing in the same way that actual events in the case of the LaGrands can be convincing. In the case of the LaGrands, German consular officials began providing the financial and logistical assistance that led to the discovery and gathering of evidence of the extremely serious abuse and neglect the LaGrands had suffered during their infancy and childhood in Germany[18]. German consular assistance after 1992 also facilitated access to State records that helped locate other witnesses, including Walter LaGrand's biological father, who provided important information about the conduct of Karl's and Walter's mother during their youth[19]. It is reasonable to conclude, moreover, that German consular officials might have been even more helpful had they been contacted when Karl and Walter were arrested in 1982, because both witnesses and documents would have been far easier to find ten years earlier.

16. Contrary to the United States suggestion, the information set forth in the sentencing report available to the trial judge does not begin to capture the extent of the neglect the LaGrands suffered as young children[20], and in any event a reference in a sentencing report cannot substitute for an effective trial presentation during a sentencing phase with appropriate expert support. Mitigating evidence about the LaGrands' extremely dysfunctional childhood and family background in Germany and the United States would have been highly relevant in sentencing. The

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[17] Memorial, Ann. pp. 309-423.

[18] Third Petition for Postconviction Relief, Memorial, Ann. pp. 1119-1127; Henry Aff. paras. 3-4, Memorial, Ann. p. 1215.

[19] Henry Aff. para. 4, Memorial, Ann. p. 1215; Molina Lopez Aff., Memorial, Ann. pp. 1223-1226.

[20] Compare Counter-Memorial, paras. 37-44, with Counter-Memorial, Exh. 6; see also Memorial, Ann. pp. 309-422.

Supreme Court of Arizona, for example, recently relied on evidence that the defendant had been seriously abused as a child and had been relatively young at the time of the offence to justify its decision to overturn a death sentence, even though it also found in that case that aggravating factors had been proved, specifically that the crime had been committed first for pecuniary gain and second in an especially cruel manner[21]. In the case of the LaGrands however, because of the United States violation of Article 36, paragraph 1, the trial court did not hear crucial mitigation evidence during the sentencing phase; because of the United States violation of Article 36, paragraph 2, no post-discovery court was authorized to consider that evidence.

17. I turn now to my third and final point. Germany respectfully submits that this Court should hesitate long and hard before joining the United States in minimizing the importance of consular notification rights when the States parties themselves, to the contrary, so evidently attached great importance to those rights.

18. That caution should apply with special force in this case, because this case, of course, involves the death penalty, where the sending State's interest in protecting its nationals is at its zenith. While this case does not involve the legality of the death penalty as a matter of international law, the Court should recognize, as has the Inter-American Court of Human Rights, that in a capital case procedural guarantees must be respected in the strictest and most rigorous way. By the same principle, a suggestion, such as that made by the United States here, that an acknowledged violation of the Vienna Convention had no consequences in a case that ended with the imposition of the death penalty should be examined under equally strict and rigorous standards.

19. The potential importance of consular notification in a capital case can only be fully appreciated when considered against the background of the widely acknowledged difficulties in the administration of the death penalty in the United States.

20. In 1972, the United States Supreme Court effectively suspended capital punishment in the United States when it ruled that the prevailing statutes permitted the death penalty to be arbitrarily and randomly imposed[22]. One of the concurring justices in that case explained his vote

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[21] *State* v. *Trostle*, 191 Ariz. 4, 19-21, 951 P.2d 869, 884-886 (Ariz. 1997); see also *State* v. *McMurtrey*, 136 Ariz. 93, 101-102, 664 P.2d 637, 645-646 (Ariz. 1983).

[22] *Furman* v. *Georgia*, 408 US 238 (1972).

by saying that, in coming to his conclusion, he could do no more than state a conclusion — this is Justice White's words — based on ten years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. He continued, that conclusion is that "the death penalty is exacted with great infrequency even for the most atrocious crimes", and that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not"; another concurring justice expressed his concern that one possible basis for distinction might be the "impermissible [constitutional] basis of race"[23].

21. Four years later, the Court effectively lifted the suspension on the death penalty by approving a death penalty statute that, in the Court's view, addressed the unconstitutional features of the earlier generation of statutes by providing "guided discretion" to judges and juries in the context of a separate sentencing proceeding[24]. Around the same time, the Court also imposed a requirement of individualized sentencing by holding unconstitutional statutes that either mandated the death penalty for specified crimes or restricted the sentencer's discretion to take into account mitigating circumstances[25]. These and other related cases represented an attempt to ensure that the death penalty would be imposed in a fair, consistent, and impartial manner.

22. A quarter-century later, it is clear that the attempt has failed. For example, the American Bar Association, with several hundred thousand members, is by far the largest and most influential professional association of lawyers in the United States. Though the ABA has no policy against the death penalty *per se*, it called in 1997 for a moratorium on executions in jurisdictions that maintained capital punishment until a series of fundamental reforms could be enacted. The report accompanying the resolution characterized the administration of the death penalty in the United States as "a haphazard maze of unfair practices with no internal consistency"[26].

23. There is a vast literature on the administration of the death penalty in the United States, and Germany does not prupose to survey it here. For present purposes, it suffices to point to three

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[23] *Furman*, 408 US at 313 (White, J., concurring), 310 (Stewart, J., concurring).

[24] *Gregg* v. *Georgia*, 428 US 153 (1976).

[25] *Woodson* v. *North Carolina*, 428 US 280 (1976); *Lockett* v. *Ohio*, 438 US 586 (1978).

[26] American Bar Association, Death Penalty Moratorium Resolution and Report, at 1 (adopted 3 Feb. 1997) [*hereinafter* 1997 ABA Report].

fundamental failings that scholars and other observers, including the ABA, have identified. Each of these failings — the widespread inadequacy of counsel in capital cases, rigid restrictions on post-conviction review of death sentences, and the persistence of racial discrimination in capital sentencing — resonates in the case of the LaGrands. I emphasize that the administration of the death penalty, of course, is not before this Court, but I review the difficulties because the rights at issue here can only be evaluated effectively in the concrete circumstances in which they might have been exercised.

24. The first difficulty, at least as interpreted by the Supreme Court, the constitutional guarantee of the assistance of counsel does not, in fact, guarantee counsel who is up to the task of defending a capital case; in the blunt words of one federal appellate judge, it "does not require that the accused, even in a capital case, be represented by able or effective counsel"[27]. That observation echoes the comments of the Arizona Appellate Court quoted this morning. A 1994 study in the *Yale Law Journal* concluded that "inadequate legal representation . . . is pervasive in those jurisdictions which account for most of the death sentences"[28]. Unsurprisingly, there is also strong scholarly support for the proposition that indigent defendants are far more likely to receive poor lawyering and hence, the death penalty[29]. Scholars have attributed the problem to the lack of compensation for capital defence attorneys, the relative inexperience of many of these attorneys, and the ever-increasing caseload of publicly funded attorneys representing indigent capital defendants[30]. Yet the 1997 ABA Report stated that

> "[j]urisdictions that employ the death penalty have proven unwilling to establish the kind of legal services system that is necessary to ensure that defendants charged with capital offenses receive the defense they require"[31].

25. Second, the frequent inadequacy of trial counsel in capital cases becomes even more troubling when combined with the prevailing restrictions on post-conviction review, which makes

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[27] *Riles* v. *McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J. concurring).

[28] Stephen J. Bright, Counsel for the Poor: "The Death Sentence Not for the Worst Crime but for the Worst Lawyer", 103 *Yale L.J.* 1835, 1840 (1994); see also American Bar Association, "Toward a More Just and Effective System of Review in State Death Penalty Cases", 40 *Am. U. L. Rev.* 1, 76-92 (1990).

[29] Memorial, para. 4.70, n. 264 (citing US academic literature).

[30] See Bright, *supra* note 19, 103 *Yale L.J.* at 1840 (describing superior prosecutorial resources and heavy caseload for capital defence attorneys); Douglas W. Vick, "Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentence", 43 *Buff. L. Rev.* 329 (1995) (surveying lack of public resources for criminal defence lawyering in capital defence cases).

[31] 1997 ABA Report, p. 6.

it difficult or impossible to remedy poor performance at trial. The late Justice Thurgood Marshall characterized this combination as a "pernicious vicegrip", and so it is[32]. Recognizing the same problem, the 1997 ABA Report called for, among other things, changes to federal *habeas* law that would permit federal courts to "consider claims that were not properly raised in state court if the reason for the prisoner's default was counsel's ignorance or neglect"[33] — a reform that would have permitted the federal courts to hear the LaGrands' Vienna Convention claims on the merits, and a reform that is consistent with Germany's view of the requirements of Article 36, paragraph 2.

26. The concern is not over technicalities. A recent study of error rates in capital cases by Professor James Liebman of the Columbia Law School showed that 68 per cent of capital convictions in the period 1973 to 1995 were found to have prejudicial error resulting in reversal by a higher court[34]. Eighty-two per cent of these errors resulted in the defendant receiving a sentence less than death, while 7 per cent resulted in findings of innocence[35]. But as the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 reflects, the trend is entirely in favour of more restrictions, not more review.

27. Finally, there is persuasive evidence that racial discrimination continues to infect the imposition of the death penalty in the United States. Studies have demonstrated that racial minorities convicted of capital crimes are much more likely to receive death sentences than white convicts[36]. Just two months ago, a Department of Justice study showed that in the last 12 years, 65 per cent of those sentenced to death in the federal courts were minorities[37]. Studies have also found that racial minorities who have been convicted of crimes against white victims are much more likely to receive the death sentence than racial minorities who have committed crimes against

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[32] Thurgood Marshall, Remarks at the Second Circuit Judicial Conference"", 86 *Colum. L. Rev.* 1, 2 (1986).

[33] 1997 ABA Report, p. 2.

[34] James S. Liebman, "A Broken System: Error Rates in Capital Cases, 1973-1995" (Columbia University School of Law, 12 June 2000) (available at http://justice.policy.net/studies (visited 8 Nov. 2000)).

[35] *Id.*

[36] David C. Baldus, George G. Woodworth & Charles A. Pulaski, Jr., "Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990)"; United States General Accounting Office, "Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities" (Report to Senate and House Committees on the Judiciary), Feb. 1990 [GAO/GGD-90-57].

[37] "Survey of the Federal Death Penalty System (1988-2000)", United States Department of Justice T306 (12 Sept. 2000) (available at http://justice.policy.net/studies (visited 8 Nov. 2000)).

other minorities[38]. Despite reform efforts, recent studies have continued to find patterns of racial discrimination in the administration of the capital punishment system[39]. But the United States Supreme Court has held that a defendant cannot state a constitutional claim by showing systemic bias in the imposition of the death penalty; instead, the defendant must meet the virtually impossible threshold of proving actual bias in his or her own case[40].

28. It may simply be that the attempt to devise a system that can fairly and impartially choose those who will die for their crimes is beyond the means of any justice system to achieve. So concluded the late Justice Harry Blackmun in 1994, shortly before he retired from the United States Supreme Court. Referring to the twin requirements of consistency through guided discretion and fairness through individualized sentencing, he explained:

> "Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the states and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake . . . Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, can never be achieved without compromising an equally essential component of fundamental fairness — individualized sentencing."[41]

After undertaking a lengthy review of the Court's death penalty jurisprudence and his own positions in those cases, Justice Blackmun concluded:

> "From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored — indeed, I have struggled — along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor."

He then stated that he had concluded that he felt:

> "morally and intellectually obligated simply to concede that the death penalty experiment has failed, that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question — does the system accurately and consistently

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[38] Michael L. Radelet & Glenn L. Pierce, "Choosing Those Who Will Die: Race and the Death Penalty in Florida", 43 *Florida L. Rev.* 1, 22-23 (1991).

[39] David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Broffitt, "Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia", 83 *Cornell L. Rev.* 1638 (1998).

[40] See *McCleskey v. Kemp*, 481 US 279, 314 (1987).

[41] *Callins v. Collins*, 510 US 1141, 127 S. Ct. 1127, 1129 (1994) (Blackmun, J., dissenting from denial of *certiorari*) (citations omitted).

determine which defendants 'deserve' to die? — cannot be answered in the affirmative."[42]

29. Of course, this Court has no need or reason to undertake the searching reassessment in which Justice Blackmun engaged. But the features of death penalty administration that so troubled him are nonetheless relevant to this case: because they increase the importance of consular assistance in capital cases; and they illustrate the difficulties that consular assistance could have helped to remedy.

30. On the basis of the specific circumstances of the LaGrands' case, including the specific circumstances of the administration of the death penalty in the United States, this Court should readily conclude that Germany has made any showing of causation or prejudice that the Vienna Convention or otherwise applicable principles of international law may require.

Le PRESIDENT : Je vous remercie, Monsieur Donovan, et je donne maintenant la parole à nouveau au professeur Bruno Simma.

M. SIMMA: Merci, Monsieur le président.

VIII. THE REMEDIES REQUESTED BY GERMANY

1. Mr. President, distinguished Members of the Court, up to now Germany has established the range of violations of Article 36 of the Vienna Convention by the United States — violations that extend not only to all the categories of its paragraph 1 but also to its paragraph 2.

2. Germany will now turn to the international responsibility of the United States for these breaches. Obviously, our arguments will be based on the general law of State responsibility. I emphasize this because during the oral hearings in the *Breard* case, United States counsel appeared to argue that breaches of the Consular Convention were subject to a separate, self-contained régime and thus exempt from the general, customary law of State responsibility[43]. Fortunately, our Respondent appears to have had second thoughts and has not repeated this argument in its Counter-Memorial in the present case. Fortunately, I mean fortunately for the Respondent.

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[42] *Id.* at 1130.

[43] *Vienna Convention on Consular Relations (Paraguay* v. *United States), Request for the Indication of Provisional Measures*, oral argument of 7 April 1998, uncorrected Verbatim Record, CR 98/7, para. 3 20 (Mr. Crook).

I. The ILC draft as line of orientation

3. Turning to the law of State responsibility, you are aware that the International Law Commission has recently reached a decisive stage in its elaboration of a set of draft articles on the subject. It is currently engaged in the second and final reading of the articles and this summer the Commission's Drafting Committee presented to the plenary a set of articles covering the entire subject-matter[44]. Just a few days ago, these draft articles were debated in the Sixth Committee of the General Assembly. The ILC has further asked governments to comment upon the draft in writing by early next year. In the context of the present case, the issue of the legal consequences of the wrongs committed by the United States and the remedies requested by the Federal Republic of Germany lies at the heart of the matters which the Commission debated just a few months ago. Hence, the judgment of the Court in our case will be of the greatest importance for the further course of the ILC work on State responsibility.

4. I am, of course, aware that the task of the International Law Commission is limited to codification of the law on State responsibility existing as customary international law or as general principles. But I think what we can say about the relevance of the ILC draft for the present case is that it may serve as a restatement of the *lex lata* on State responsibility; a restatement of considerable authority on which we may rely in our discussion of the subject. On the very basis, the draft articles have already been resorted to by this Court particularly in the *Gabčíkovo-Nagymaros* case[45]. In line with this precedent, Germany will present its claims on the responsibility of the United States and the remedies it seeks following the proposals of the ILC. And I might mention that none of the criticism directed against the ILC draft in the recent Sixth Committee debates related to the provisions that I am going to take up in the following.

II. Germany as an injured State

5. Mr. President, the first argument that we want to make is that Germany is entitled to invoke the responsibility of the United States as an *injured State*. Germany incurred such injury in a twofold way: first, at the direct inter-State level through the violations of Article 36 analysed

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[44] International Law Commission, Report on the work of its fifty-second session, General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10, United Nations Doc. A/55/10 (2000), at pp. 124 *et seq.*

[45] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, paras. 49 *et seq.*

earlier. In this regard, we are in presence of crystal-clear treaty breaches which, as I have to remind you again, are only acknowledged by the United States to a very limited extent. Germany considers itself injured not only by the breach of Article 36, subparagraph 1 *(b)*, but also by breaches of subparagraph 1 *(a)* and *(c)*, as well and no less importantly, of paragraph 2 of Article 36.

6. Secondly, Germany also considers itself injured indirectly by the infringement on the part of the United States of the individual rights of the LaGrand brothers. We have argued that Article 36 of the Consular Convention establishes not only rights and correlative obligations running between the States parties but also — and here I again quote from the pleadings of our Respondent in the *Tehran* case 20 years ago — rights "perhaps even more importantly for the nationals of the sending State who are assured access to consular offices and through them to others"[46]. We cannot but agree with this view. What Germany is exercising here is its right of diplomatic protection through, in the words of the *Mavrommatis* formula, "taking up the case of [two] of its subjects and by resorting to . . . international judicial proceedings on [their] behalf"[47]. In doing so, Germany neither impairs the dignity nor the clarity of the present proceedings, as the US Counter-Memorial accuses us of doing[48]. In our view such an exercise of diplomatic protection constitutes an application of what the International Law Commission calls "secondary rules" of international law, and there can be no doubt that it also constitutes an "application of the Convention" in the sense of Article I of the Optional Protocol to the Vienna Convention which is the basis of the Court's jurisdiction. There is nothing exorbitant or presumptuous in claiming that a certain aspect of the "application of the Convention" relating to rights accruing to foreign nationals may coincide with diplomatic protection of these nationals violated in their treaty rights by a State party to the Consular Convention. Since we are in the field of diplomatic protection, this aspect of the German claim is one to which the rule of exhaustion of local remedies applies. In this regard

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[46] *I.C.J. Pleadings 1980*, p. 174.

[47] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12.

[48] Counter-Memorial, para. 74.

let me emphasize that Karl and Walter LaGrand as well as Germany had exhausted all available judicial remedies in the United States only at the end of 1998[49].

7. Mr. President, my colleague and friend, Professor Dupuy, will deal with the non-observance of the Order of this Court in a comprehensive way, following our arguments relating to the violations of the Consular Convention. Let me just indicate for the sake of completeness that Germany considers itself injured also by the United States disregard for that Order. This disregard constitutes a violation of its own but it certainly also aggravates the breaches of Article 36.

III. The damage involved

8. So much about the injury suffered by Germany. According to Article 31 on reparation proposed by the Commission's Drafting Committee this summer: "injury consists of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State". Germany has chosen not to raise any issue of material damage. Hence, the damage suffered by Germany, rendering it an injured State entitled to invoke responsibility, is to be found in the moral damage inflicted by the Respondent through, first, neglecting its obligations under Article 36 of the Consular Convention and subsequently disregarding the Order of this Court through the execution of Walter LaGrand in full awareness of its preceding wrongful acts as well as of the irreparable consequences of disregarding the Order.

IV. The remedies sought by Germany

9. Mr. President, distinguished Members of the Court, what legal consequences arise from these violations of international law? I submit that there is an answer to these questions which imposes itself naturally and spontaneously, as it were, to any observer assessing the situation *sine ira et studio* and with common sense: namely the United States is to concede the breaches and enact necessary safeguards against repetition. And this is precisely what Germany invites the Court to do: to make a pronouncement confirming authoritatively the fact of all the breaches committed by the United States, and state in a legally binding way that the Respondent shall

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[49] *LaGrand* v. *Stewart*, United States Supreme Court, 7 Dec. 1998, 119 S.Ct. 422 (Mem), Memorial, Ann. 11, at p. 495.

provide Germany not only with an apology but also with an adequate assurance that it will not repeat its unlawful acts, and that in the future it will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention, particularly in cases involving the death penalty.

10. Let me now check this common-sense answer as it were, against the system of legal consequences and remedies devised by the International Law Commission this year. I might mention that, with regard to assurances and guarantees of non-repetition, the proposals made by the Drafting Committee effected a certain change: while the draft adopted at first reading referred in Article 46 to such guarantees as one particular form of reparation, the guarantees are now combined together in draft Article 30 with the duty of the responsible State to cease its breaches. In doing so, the Drafting Committee followed the view of Special Rapporteur James Crawford, and others, that assurances and guarantees of non-repetition perform a distinct and autonomous function; they are future-oriented and serve a preventive rather than a remedial purpose[30]. Thus, the articles as proposed by the International Law Commission state the obligation of a wrongdoer "to offer appropriate assurances and guarantees of non-repetition, if circumstances so require".

11. We will follow this distinction. However, as a matter of convenience, I will deal with the remedies that I have indicated in the reverse order. Thus, I will first take up the question of reparation requested by Germany and then return — and focus on — the obligation on the part of the United States to provide appropriate safeguards against repetition, as to remedy most important to us under the circumstances of the present case.

1. Reparation

12. Mr. President, let me therefore turn to the reparation which Germany requests. As the Permanent Court stated in the *Factory at Chorzów* case:

> "The essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and

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[30] International Law Commission, Fifty-second session (Second part), Provisional Summary Record of the 2662nd meeting, 17 Aug. 2000, United Nations Doc. A/CN.4/SR.2662 (4 Sept. 2000), at p. 6. See also James Crawford, Third Report on State Responsibility, United Nations Doc. A/CN.4/507 (2000), paras. 53-59.

> re-establish the situation which would, in all probability, have existed if that act had not been committed."[51]

The Court then refers to restitution, followed by compensation. The ILC draft conforms to this order and then names satisfaction as a third remedy.

13. As to restitution, you will remember that in its Application of 2 March 1999 for preliminary measures, Germany requested the re-establishment of the situation that existed before the detention of, proceedings against, and conviction and sentencing of Walter LaGrand. Germany further asked that, pending the final judgment, the Court indicate that the United States should take all measures at its disposal to ensure that Walter LaGrand was not executed. Following Germany's request, the Court indicated unanimously that the United States should take all measures to ensure this result. However, the Respondent showed itself unimpressed by the Order and executed Walter LaGrand, thus rendering the restitution of the *status quo ante* impossible.

14. Turning to compensation, Germany has decided not to raise a claim in this regard because the policy it pursues in lodging the present Application is to ensure that German nationals will be provided with adequate consular assistance in the future, and thus be protected against the fatal consequences following from breaches of Article 36 in circumstances like those leading to the death of the brothers LaGrand. Germany thus renounces its right to material reparation. This decision is entirely up to Germany. It is for the injured State alone to decide what remedies to pursue. Germany has made this choice and now requests the Court to pronounce upon the satisfaction owed to it by the United States.

2. Satisfaction

15. There are several reasons why Germany insists on satisfaction. First, as confirmed by the International Law Commission, satisfaction is a remedy designed especially for those cases in which injury cannot be made good by restitution or compensation[52]. This is precisely the case here.

16. The second reason why Germany requests the Court to obligate the United States to render satisfaction lies in the particularly grave character of the moral damage inflicted upon

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[51] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J. Series A, No. 17*, p. 47. The authentic French text reads: *"Le principe essentiel, qui découle de la notion même d'acte illicite... est que la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis."*

[52] Cf. draft Article 38 provisionally adopted by the Drafting Committee on second reading, *supra* note 2, at p. 133.

Germany. As we set out in our Memorial[53], and repeated in shorter form this morning, the US Federal Government as well as the State of Arizona completely ignored the repeated urgent requests of the highest State organs of Germany. Then, the Solicitor General argued before the Supreme Court in favour of simply ignoring the Order of this Court and against any federal interference in the course of events leading to the death of Walter LaGrand. Thus, moral damage was done both to the authority of this Court and to Germany. Germany could do nothing but watch how its rights were simply being ignored by the United States.

17. In the terms of ILC draft Article 38 of this summer, satisfaction may consist of an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality. Now, what did the United States offer? On 18 February of this year, the Department of State sent the German Embassy in Washington a note in which it "deeply regretted" that neither Walter nor Karl LaGrand was told that he could request consular assistance. On behalf of the United States, the Department of State extended "sincere apologies" to the Government of Germany for the failure of US authorities to observe the obligations of Article 36. The Department of State further informed the German Government that it had completed a thorough investigation into the case of Walter and Karl LaGrand and that it was engaged in a comprehensive effort to improve the performance of US authorities both at the federal and State level with regard to consular notification requirements[54].

18. A look at the United States Counter-Memorial reveals, however, that the United States considers itself in breach only of Article 36, subparagraph 1 *(b)*, of the Vienna Convention. And the Counter-Memorial dismisses the German claims that the United States had also violated subparagraph 1 *(a)* and *(c)*, as mere "add-on" claims which the United States finds "misplaced"[55]. And the United States denies any responsibility for any breach of Article 36, paragraph 2, of the Convention. Further, contrary to the view which the Respondent itself took 20 years ago in the *Tehran* case[56], the United States now denies that Article 36 gives rise to individual rights. And,

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[53] Memorial, para. 6.54.

[54] Counter-Memorial, Ann. 2.

[55] Counter-Memorial, para. 70.

[56] *ICJ Pleadings 1980*, p. 174.

apparently, the United States considers that it did nothing wrong in simply ignoring the Order of this Court. Hence, what the United States does have to offer by way of satisfaction, that is, by way of acknowledgment of its breaches and by way of apology, is clearly insufficient. Therefore, Germany asks the Court for a judicial pronouncement of every, I repeat every, internationally wrongful act committed by the United States in the present case.

19. Mr. President, we consider such a judicial pronouncement of illegality as the most important form of satisfaction that we can seek. We base our view on the constant jurisprudence of international courts and tribunals, beginning with the *Corfu Channel* Judgment of this Court[57]. All contemporary authors, prominently among them Special Rapporteur James Crawford[58], concur[59]. Besides repairing the moral damage inflicted, and in view of the extremely narrow position of the United States as to the scope of obligations flowing from Article 36, in particular Article 36, paragraph 2, what Germany expects from your pronouncement in this regard is legal certainty about what Article 36 implies by way of such obligations.

20. In view of the flagrant disregard of the United States both for the requests put forward by the highest authorities of the Federal Republic of Germany and for the Order of this Court, Germany asks the Court to declare the United States under an obligation to render satisfaction also by establishing adequate safeguards against repetition, that is, measures going well beyond the — insufficient — steps already undertaken by the Respondent. Hence, Mr. President, Germany bases its Submission No. 4 not only on the legal position which it shares with the International Law Commission, according to which the obligation to offer appropriate assurances and guarantees of non-repetition is a self-standing legal consequence directed at the future. Germany considers such safeguards also as "another appropriate modality" to provide satisfaction, to use the ILC's expression. Germany thus rests its claim to such safeguards on two different legal foundations. It may well be true that satisfaction is not a common form of reparation. But it is also true that certain circumstances surrounding breaches of international law or certain consequences of such breaches cry out for an appropriate form of satisfaction. In this vein, in view of the cavalier fashion

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[57] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4.

[58] J. Crawford, Third Report on State Responsibility, UN Doc. A/CN.4/507/Add. 1 (2000), para. 182.

[59] For additional references, see Memorial, para. 6.62, footnote 580.

in which the United States disposed of the requests of Germany and the present Court, a judicial pronouncement which does not rest content with demanding mere promises but which obliges a State responsible of entire patterns of breaches to come up with a truly adequate guarantee against repetition is highly appropriate. In the context of death penalty cases, such a remedy is not at all out of proportion to the injury — a point to which I will return later — and it is not in the least humiliating to the United States — to quote two limitations which the International Law Commission foresees in its draft..

21. Mr. President, let me state that Germany regards declaratory relief in the form of a pronouncement of this Court as constituting the form of satisfaction, and thereby the modality of reparation, most appropriate under the circumstances, especially because the United States on its own initiative has only acknowledged one out of the totality of breaches it has committed. Secondly, in view of the veritable pattern of repetition of violations of Article 36, an offer of appropriate safeguards against repetition is also owed to Germany as a "special remedy for injury to [Germany's] dignity, honour and prestige", to quote Professor Arangio-Ruiz's Second Report on State Responsibility of 1989[60]. Germany cannot tolerate that violations of its treaty rights, and of the rights of its nationals, resulting in its nationals being subjected to the death penalty in the United States, are handled in as light-handed a way as the Respondent currently sees fit.

V. In particular: Assurances and guarantees of non-repetition

22. Mr. President, distinguished Members of the Court, let me continue my consideration of the assurances and guarantees of non-repetition which Germany requests by turning to their additional, or alternative, legal foundation, which was accepted by the International Law Commission and which I sketched out earlier. There I drew your attention to the fact that the Commission now views these safeguards as a corollary of the duty of cessation of internationally wrongful acts. However, such a *revirement* of our remedy does not affect in the least its importance or its substance.

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[60] G. Arangio-Ruiz, "Second Report on State Responsibility", *Yearbook of the International Law Commission*, 1989, Vol. II (Part 1), p. 1, at 31, para. 106.

1. Their basis in international law

23. Such a remedy of assurances and guarantees of non-repetition may be exceptional, may not be appropriate in all circumstances, but it is certainly in place, indeed necessary, where there exists a real, clearly established danger of repetition of breaches. This precisely is the meaning of the phrase "if circumstances so require", which the International Law Commission has added to the text adopted at first reading. It is precisely in this sense that Germany's request is to be seen. This claim is firmly anchored in international law. It is remarkable to see how Special Rapporteur Arangio-Ruiz's proposal to expressly restate assurances and guarantees of non-repetition as a distinct consequence of breaches of international law, adopted by the ILC[61], was quickly followed by State practice. For instance, in the *Gabčíkovo-Nagymaros* case, both Parties requested the Court to pronounce upon this very remedy[62]. In its Judgment the Court took up these claims by dealing extensively with the future performance by both Parties of their international obligations. State practice amounting to assurances and guarantees of non-repetition is particularly prevalent in human rights cases. Let me remind you of the friendly settlement reached earlier this year in the case of *Denmark* v. *Turkey* before the European Court of Human Rights[63], as well as of the constant jurisprudence of the Inter-American Court of Human Rights[64]. It is also important to note that, neither in their comments on the ILC draft articles adopted at first reading in 1996, nor in the recent Sixth Committee debates, any government suggested the deletion of the draft article embodying our assurances and guarantees[65]. On the contrary, while the majority of governments

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[61] For the text of draft Article 46 (then 10*bis*) on first reading with Commentary thereto, see "Report of the International Law Commission to the General Assembly on the work of its forty-fifth session", *YILC*, 1993, Vol. II (Part II), pp. 81-83; for Professor Arangio-Ruiz's proposal, see G. Arangio-Ruiz, "Second Report on State Responsibility", *YILC*., 1989, Vol. II (Part 1), p. 1, at 42, paras. 148-163 and at 56, para. 191, Art. 10.

[62] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at pp. 12, 16, 17. See also the Judgment of the Court, *ibid.*, paras. 130 *et seq.*

[63] ECHR, *Denmark* v. *Turkey*, Application No. 34382/97, Judgment of 5 April 2000, Friendly Settlement, para. 21, available at the Court's Website, http://www.dhcour.coe.fr (last visited 2 Nov. 2000).

[64] E.g., IACHR, *Loayza Tamayo*, Judgement of 27 November 1998, Series C: Decisions and Judgements, No. 42, para. 164; IACHR, *Castillo Petruzzi et al.*, Judgment of 30 May 1999, Series C: Decisions and Judgements, No. 52, para. 222.

[65] ILC, Fiftieth session, State responsibility, Comments and observations received from Governments, United Nations Doc. A/CN.4/488 (1998), at 113, 114.

did not comment on this remedy, apparently because it took it for granted, several States expressly welcomed its incorporation in the draft[66].

24. I would submit that the remedy also conforms to a principle of law common to the legal systems of both parties involved. Thus, German law provides claimants with the device of the preventive injunction *(vorbeugende Unterlassungsklage)* aimed at putting the executive under an obligation to abstain from repeating a certain conduct declared unlawful[67]. In United States law, actions for declaratory relief are often combined with requests for mandatory injunctions to review executive conduct and make the declaration of the unlawfulness of such conduct effective[68]. For instance, in the case of *Gore* v. *Turner*[69], the court resorted to injunctive relief as a remedy to ascertain that the underlying legal obligation was being enforced and abided by. In *Leblanc-Sternberg* v. *Flecher*[70], the court added that the injunction placed "the parties in a position which ensured that their constitutional rights remained inviolate". Both legal systems thus provide remedies enjoining the infringing party from repeating practices that have constituted a violation of the other party's rights.

2. Their necessity in the present case

25. Mr. President, before I turn to the German request for assurances and guarantees in more detail, let me clarify a few points. Observers agree that the safeguards are dependent on two parameters, as it were, namely, first, the seriousness of the breach and, second, the risk and

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[66] See, e.g., the statements to the Sixth Committee by the New Zealand representative, Ms. Victoria Hallum, on 25 Oct. 2000, available at the Internet website of the New Zealand Mission to the United Nations, http://www.un.int/newzealand/intlaw.htm (last visited 2 Nov. 2000); the Croatian Representative, Ambassador Ljerka Alajbec, on 25 Oct. 2000, available at the Website of the Croatian Mission to the United Nations, http://www.un.int/croatia/statem.html (last visited 2 Nov. 2000); and the Italian representative, Mr. Leanza, on 25 Oct. 2000, manuscript, p. 4. For a complete summary of the debates of the Sixth Commission on the draft Articles, see United Nations Press Releases GA/L/3154, GA/L/3155, GA/L/3156, GA/L/3158 of 23-27 Oct. 2000, available at the webpage http://www.un.org/News/Press (last visited 2 Nov. 2000).

[67] Decision of the *Bundesverwaltungsgericht* (BVerwG, German Federal Administrative Court) of 16 April 1971 — IV C 66.67, publ. in DVBl. 71, p. 746; Dieter Lorenz, *Verwaltungsprozessrecht*, *Enzyklopädie der Rechts-und Staatswissenschaft*, Heidelberg 2000, para. 24 No. 19, p. 407; Friedhelm Hufen, *Verwaltungsprozessrecht*, 3rd ed., München 1998, para. 16 No. 10 (pp. 337, 338), Hüttenbrink in: Wolfgang Kuhla, Georg Hüttenbrink, *Der Verwaltungsprozeß*, München 1998, p. 131, No. 217.

[68] A. van Alstyne, Judicial Protection of the Individual against the Executive in the United States of America, in: *Gerichtsschutz gegen die Exekutive*/Judicial Protection against the Executive/*La protection juridictionelle contre l'exécutif*, Vol. II, (H. Mosler ed.), New York/Köln 1970, p. 1123.

[69] *Gore* v. *Turner*, 563 F.2d at 165; see also *Marable* v. *Walker*, 1983704 F.2d 1219, 1221 (11th Cir. 1983); *United States* v. *Jamestown Center-in-the-Grove Apartments*, 557 F.2d 1079 (5th Cir.1977).

[70] *Leblanc-Sternberg* v. *Flecher*, 104 F.3d 355, 355+, 1996 WL 699648, *5 (2nd Cir 1996).

apprehension of repetition. According to both of these parameters, our case ranges very high. Further, while assurances are normally given verbally, guarantees of non-repetition go beyond that and involve certain preventive actions to be taken by the responsible State and specifically designed to avoid repetition. This is how the report of the International Law Commission Drafting Committee of this August put it[71]. In our view, it is imperative in the present case to demand results, not mere words or futile efforts, also in the United States domestic sphere. The same Drafting Committee report emphasizes that the terms "appropriate" and the phrase "if circumstances so require" are designed to emphasize the exceptional nature of the remedy in question[72]. But what this means is that exceptionally urgent situations call for exceptional remedies and precisely this is the situation before you.

26. Mr. President, Members of the Court, Germany is firmly convinced that the present dispute is a case *par excellence* where circumstances do require that the responsible State provide assurances and guarantees that are really appropriate, to use the words of the ILC draft article! If you look at our case, it seems as if the Commission had precisely the present situation in mind in drawing up its Article 30 on cessation and non-repetition. If you were asking for a textbook example of a constellation in which no combination of remedies other than one comprising guarantees of non-repetition appears adequate to render justice, you would find it in the Article 36 in connection with the death penalty case which is now before you.

27. Now, as to the measures which the United States has taken so far in order to "remedy" the situation. They are described in some detail both in the Counter-Memorial (paras. 20 ff.) and in the US Note to which I have referred and which you will find in the Annex (Note of 18 February 2000). I have said earlier that they consist of an information campaign which appears to have started in connection with the *Breard* case. However, the fact is that these measures simply do not go far enough. Two American observers remarked recently

> "these steps are laudable, but such actions have been insufficient in the past and offer little reason to believe they will suffice in the future. Put simply, there is little incentive under the current remedial scheme for State and local authorities to comply with provisions of the Vienna Convention. Whether wilfully or through ignorance,

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[71] ILC, Fifty-second session (Second part), Provisional Summary Record of the 2662nd meeting, 17 Aug. 2000, United Nations Doc. A/CN 4/SR 2662 (4 Sept. 2000), at p. 6.

[72] *Ibid.*

> violations of the Vienna Convention are currently underdeterred and will continue to be so until a remedy with teeth is adopted and enforced."[73]

We can only concur with this assessment. The measures hitherto taken have simply not proven to be sufficient to prevent violations of Article 36. This was also recognized by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye in his report of 1998 on the situation in the United States where he said:

> "Although . . . the State Department has, on several occasions, informed officials of various States, including governors and attorneysgeneral [sic], of their duties under Article 36, it appears that the periodic advisories given by the Department receive no consideration."[74]

If you recall what I said this morning, as recently as September not even the Attorney-General of the State of California was aware that — and how — the notification obligations under the Consular Convention were to be implemented domestically.

28. Mr. President, what we see — regrettably — is an almost consistent pattern of behaviour on the part of the United States: violations of Article 36 happen with great frequency; and then they are "waved through", so to speak, with the usual apologies and promises that everything will be done to prevent future breaches. But the breaches then occur again and again and there is simply no end of this pattern in sight.

3. Their particular urgency in death penalty cases

29. In view of this, Mr. President, what is needed is a remedy "with teeth", to quote the United States observers. And the need for measures to be taken by the Respondent which do not just scratch the surface but go at the heart of the matter, is particularly urgent in cases where the death penalty is involved. "Death *is* different". In the words of the same two American observers:

> "Capital punishment, once imposed, is irreversible and unremediable. A mistake that results in an erroneous prison sentence is oppressive, but at least the wrongfully convicted inmate is alive. The legal system may have excised years from his life, denied his freedom and dignity, yet some kind of compensation can be made. Death, of course, is wholly different; it's all over except the official apologies."[75]

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[73] E. Luna/D. Sylvester, Beyond *Breard, 17 Berkeley Journal of International Law* (1999) 147, at 188.

[74] Report submitted pursuant to Commission resolution 1997/61 of 22 January 1998, United Nations Doc. E/CN.4/1998/68/Add.3, para. 119.

[75] Luna/Sylvester, *supra* note 31, at 49.

Hence, in the context of the death penalty, violations of Article 36 assume a different, much more threatening quality. Let me repeat what the Inter-American Court of Human Rights said in its Opinion of last October:

> "[N]onobservance of a detained foreign national's right to information, recognized in Article 36 is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be 'arbitrarily' deprived of one's life, in the terms of the relevant provisions of the human rights treaties."[76]

30. To emphasize once again, in the face of situations like those that led to the execution of Mr. Breard, Mr. Faulder and the brothers LaGrand — and, of course, we could add others to that list as we have heard this morning — official apologies offered *ex post facto*, information campaigns and the like are clearly insufficient. Therefore, Mr. President, I submit that we find ourselves precisely in the situation envisaged by Article 30 of the ILC draft: we are in presence of circumstances which require that truly appropriate guarantees and assurances are given.

31. Mr. President, let me remind you of the causation argument that Mr. Donovan has just offered. This morning we also demonstrated that we are in the presence of a truly vicious circle here — a fatal situation called "absurd as Catch-22" by our late friend Keith Highet[77]. There is thus no way around the conclusion that the combination of factual and (domestic) legal circumstances described earlier in detail renders the adoption by the United States of a more effective remedy absolutely necessary.

4. No excuse by reference to domestic law

32. Mr. President, Germany does not claim that the relevant US domestic legislation and jurisprudence as such are in breach of international law. Rather, what happens is that the application of the rules on procedural default by US domestic courts to the right to information contained in Article 36 renders it almost certain that the Catch-22 situation will occur time and again.

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[76] Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 Oct. 1999, para. 131.

[77] K. Highet, The Emperor's New Clothes: Death Row Appeals to the World Court? The *Breard* Case As a Miscarriage of (International) Justice, in: *In Memoriam Judge José-Maria Ruda*, manuscript, p. 6, Annex 39 to the German Memorial.

33. Now, I expect that tomorrow we are going to hear that it would be impossible for the United States to remedy the situation, to eliminate this vicious circle by changing its domestic law. What we might hear is that the federal system of the United States imposes limits on the Federal Government's ability to interfere with the criminal justice systems of the States, as the US Government has already argued before the Supreme Court in the *Breard* case, opposing the view that the United States was under a legal obligation to implement the Order of this Court. But customary law is crystal clear on this point. No feature of domestic law, federalism or anything else, can justify breaches of international law or a refusal to make good an international wrong. A State responsible for the internationally wrongful acts may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising in consequence of breaches of international law, among them the duty to effectively prevent further breaches. We do not want to deny the difficulties which may arise for the US Federal Government in effecting such appropriate assurances and guarantees. But again, the United States simply cannot rely on the status quo of its internal law as a justification for failure to comply with its obligation to provide appropriate safeguards where such steps are necessary. I have mentioned already that such safeguards are part of State practice, especially in the human rights field. And I have also argued that the individual right enshrined in Article 36 has assumed the quality of a human right, particularly in the context of the death penalty.

34. Mr. President, distinguished Members of the Court, Germany does not therefore ask for anything exorbitant. It simply asks the Court to confirm that the United States is to do what it must do under existing international law. In this sense we request you to pronounce that, to quote the modified version of our fourth submission,

> "the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations".

And our submission continues:

> "In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36."

This is what Germany considers appropriate and necessary under the specific factual and legal circumstances. Violations of Article 36 followed by death sentences and executions cannot be remedied by apologies or the distribution of leaflets. An effective remedy requires certain changes in US law and practice.

5. No abuse of the International Court of Justice as a court of criminal appeal

35. Mr. President, what I am going to say now is extremely important to us: in requesting the Court to pronounce upon an obligation of the United States to provide efficient safeguards, we in no way intend to use — or rather abuse — this Court as a court of criminal appeal! All we ask of you is to pronounce upon the consequences of specific breaches of international law by the United States, and to confirm that the Respondent owes Germany the forms of reparation and safeguards against repetition that are provided for by international law currently in force as necessary under the circumstances.

6. Choice of means left to the United States

36. Mr. President, our Submission (4) has been so worded as to ensure that the rights of German nationals under Article 36 will be respected by the United States in the future, but at the same time to leave the choice of means by which to implement the remedy we seek to the United States. It is neither our intention nor the function of this Court to propose specific ways and means by which the United States can secure the conformity of its law and practice with its international legal obligations. But we consider that it is the task of the Court to see to it that the United States fulfil its obligation under Article 36. This, and nothing else, is what Germany asks this Court to do — and in no way to serve as a global court of appeals in criminal cases.

37. To once again turn to the wording of Submission (4), the terms "law and practice" used there refer to the necessity of the United States fulfilling its international obligations not only in words but also in deeds. As we pointed out in our analysis of Article 36, the effective exercise of the right to consular notification embodied in paragraph 2 requires that, where it cannot be excluded that the judgment was impaired by the violation of the right to consular notification, appellate proceedings allow for a reversal of the judgment and for either a retrial or a re-sentencing.

38. Please note that the formula we use in Submission No. 4 does not exclude that domestic law require the showing of some kind of "prejudice", that is, influence of the failure of notification on the penalty imposed. On the other hand, our formula is designed to exclude that, as is currently the case in the United States, domestic law provides any realistic prospect of challenging a conviction or penalty on the basis of Article 36. A domestic requirement of prejudice must be applied reasonably, as the US Supreme Court itself clarified in a judgment this year[78], this means that, it must not frustrate the remedy which Germany seeks in such a regular, almost total and automatic way as happens now. This is of special importance in those instances in which the Respondent did not know of his rights precisely because of the failure of the State to inform him as required in Article 36. The State must not be allowed to benefit from its illegal omission. A "review" of criminal convictions, therefore, does not require "restitution" but what it does mean is that an automatic bar against the raising of a post-conviction claim based on a violation of Article 36 is not compatible with international law. The formula "in particular in cases involving the death penalty" in the second sentence of our Submission No. 4 emphasizes that death is different. As we pointed out, in death penalty cases procedural guarantees are of particular relevance and importance, to put it mildly. But of course, this does not mean that Article 36 must not be respected in other cases, too.

39. As I emphasized a few minutes ago, the choice of means by which to introduce a domestic remedy necessary under the circumstances is to be left to the United States. But what I want to stress is that, as Germany has set out in detail in its Memorial, the US legal system does provide the US authorities with the appropriate means to remedy the violation of Article 36 of the Convention[79].

40. In conclusion, Mr. President, let me state once again that it is not the intention of Germany to lure this Court into the intricacies of US domestic law. As I repeated, the choice of means to realize in its domestic sphere the safeguards which Germany requests is up to the United States.

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[78] ***William v. Taylor*, 120 S.Ct. 1495 (2000).**

[79] **See Memorial, para. 6.87.**

Mr. President, distinguished Members of the Court, this completes the German arguments concerning the violations of the Consular Convention by the United States and the remedies that Germany seeks. I guess that the time has come for the coffee break, but with regard to what comes after the coffee break, I would kindly ask you, Mr. President, to then give the floor to Professor Pierre-Marie Dupuy for the final part of our pleadings, devoted to the breach of the Order of 3 March 1999.

Merci, Monsieur le président.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. La Cour suspend pour un quart d'heure.

L'audience est suspendue de 16 h 30 à 16 h 45.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne maintenant la parole au professeur Pierre-Marie Dupuy.

M. DUPUY :

IX. LE MANQUEMENT DES ETATS-UNIS AUX OBLIGATIONS ÉTABLIES PAR L'ORDONNANCE DU 3 MARS 1999

1. Monsieur le président, Madame et Messieurs les juges, je prends toujours la parole devant la Cour avec un très vif plaisir mêlé au sentiment de ma responsabilité. Dans cette affaire, je suis particulièrement honoré de la confiance qu'a bien voulu me faire la République fédérale d'Allemagne, à laquelle me lie au demeurant des liens particuliers. Le 3 mars 1999 restera dans les annales de la première juridiction internationale. La Cour internationale de Justice prit, ce jour là, à l'unanimité, une initiative qu'elle n'avait jamais prise auparavant, pas davantage que ne l'avait fait sa devancière, la Cour permanente de Justice internationale. Elle décida d'agir d'office, *proprio motu,* pour la première fois depuis 1920, en application de l'article 75 de son Règlement. Et elle le fit pour ordonner des mesures conservatoires qui demandaient aux Etats-Unis la chose, à vrai dire, la plus simple qu'on puisse lui accorder : du temps ! Un peu de temps, car la Cour avait démontré là, comme l'année précédente en des circonstances similaires, que, malgré la modicité des moyens matériels dont elle dispose, elle peut décidément agir très rapidement, lorsque les circonstances

l'imposent. Dans cette ordonnance du 3 mars, la Cour demandait aux Etats-Unis de lui accorder le temps qu'il lui faudrait pour adopter la décision finale répondant à la requête allemande dans la présente affaire.

2. La Cour pouvait agir d'une façon aussi inhabituelle parce que sa compétence dans l'affaire introduite par l'Allemagne lui avait paru *prima facie* incontestable. Mais elle agissait aussi parce que chacun de ses membres était animé par «des considérations élémentaires d'humanité». L'équipage d'un navire en mer accepte spontanément de se détourner de ses voies habituelles pour porter secours à un homme en détresse. La Cour fit de même. Si elle a unanimement décidé d'agir vite, et de son propre chef, c'est parce que ce qui était en jeu, précisément, c'était la vie d'un homme. Il fallait faire vite, la Cour le savait d'expérience, depuis l'affaire concernant Francisco Breard, dont rien ni personne n'avait pu seulement retarder la mise à mort. Or, l'exécution de Walter LaGrand était prévue pour le jour même, le 3 mars 1999 et aucun des efforts accomplis par l'Allemagne fédérale pour sauver le frère cadet de Karl n'avait abouti. Aucun non plus n'avait pu infléchir le cours inexorable des choses pour Walter LaGrand lui-même. Ni les appels répétés à la clémence émanant du président de la République fédérale; ni ceux du chancelier; ni ceux du ministre des affaires étrangères et du ministre allemand de la justice, pas plus que n'avait été entendu l'appel à la clémence de l'Union européenne, regroupée autour d'une même conception des droits de l'homme. Au niveau local, les explications apportées par l'ambassadeur et le consul d'Allemagne au *Board of Executive Clemency* n'avaient pas davantage eu d'effet.

3. Ainsi, il était tard parce que, jusqu'à la veille de l'exécution, l'Allemagne avait essayé d'épuiser toutes les voies diplomatiques avant de se résoudre à l'action judiciaire. Il était même d'autant plus tard que le *State Attorney* d'Arizona avait attendu le 23 février 1999, soit la veille de l'exécution de Karl LaGrand, avant d'admettre publiquement n'avoir jamais ignoré la nationalité allemande des deux frères. Dès lors, si elle voulait prétendre à l'efficacité, la Cour devait jeter dans la balance de la justice internationale toute son autorité, déjà bafouée une fois dans des circonstances identiques un an plus tôt.

4. Pourtant, pour la seconde fois en moins d'un an, plusieurs organes publics des Etats-Unis, lui ont sèchement signifié le peu de cas qu'ils faisaient du droit international comme de sa propre

autorité. A la réception de l'ordonnance en mesure conservatoire émise par la Cour en l'affaire *Breard*, le Gouvernement des Etats-Unis avait au moins manifesté une réaction par la voie Mme Madeleine Albright, en invitant le gouverneur de Virginie à tenir compte de cet acte judiciaire; il est vrai que, dans la même lettre, le secrétaire d'Etat se prononçait ouvertement pour le caractère facultatif de telles mesures. ce qui revenait, dans les circonstances, à en ruiner toute chance de mise en œuvre. En revanche, dans l'affaire *LaGrand*, il n'y eut pas même de réaction des autorités fédérales américaines. Elles se contentèrent de communiquer l'ordonnance de la Cour au gouverneur d'Arizona, lequel avait pourtant déclaré la veille que, «dans l'intérêt de la justice», elle décidait de faire procéder à l'exécution de Walter LaGrand à la date initialement prévue. Quant à la Cour suprême des Etats-Unis, à la fois saisie par le condamné et par l'Allemagne, elle maintint la même position d'intangibilité que celle à laquelle elle s'était tenue dans l'affaire *Breard*. Comment en aurait-il pu, d'ailleurs, en être autrement, puisque, le *Solicitor-General* des Etats-Unis avait lui-même tenu la déclaration suivante : *"an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief..."*[80] On assistait donc au *"remake"* d'un film pathétique, qui n'avait pourtant rien d'une fiction... Il y eut ainsi une exécution, à la fin de ce jour-là, dans une prison d'Arizona; ce ne fut cependant pas celle de l'ordonnance de la Cour, mais celle de Walter LaGrand, que, décidément, personne n'aura pu sauver de la chambre à gaz.

5. Ainsi confrontée à la méconnaissance par le défendeur de mesures conservatoires indiquées par la Cour, l'Allemagne fédérale a inclus dans les conclusions qu'elle soumet à la Cour celle qui la prie de dire et juger, j'en donne ici ma traduction française,

> «que les Etats-Unis, en ne prenant pas toutes les mesures à leur disposition pour s'assurer que Walter LaGrand ne serait pas exécuté jusqu'à l'arrêt final de la Cour internationale de Justice en la matière, ont méconnu leur obligation internationale de respecter l'ordonnance en mesures conservatoires prononcée par la Cour le 3 mars 1999 comme celle de s'abstenir de toute action qui pourrait interférer avec le sujet du présent litige tant que la procédure y relative reste ouverte».

Cette requête suppose dès lors que l'on identifie clairement l'obligation comportée par le dispositif de la Cour. Elle débouche sur l'interrogation plus large concernant la portée juridique exacte à accorder aux mesures conservatoires. Le réexamen de ce problème à la fois classique et rendu un peu confus par une certaine glose arrive ainsi à point nommé dans l'histoire de la juridiction internationale; en un temps où l'on oppose ses pouvoirs en la matière à ceux que possèdent d'autres juridictions internationales, créées beaucoup plus récemment, on a parfois tendance à conclure hâtivement dans un sens défavorable à la Cour; certains prétendent encore qu'elle ne saurait, pour ce qui la concerne, ordonner des mesures véritablement obligatoires. Or, la question n'a rien d'académique, puisque le nombre des cas où on la sollicite pourtant d'en donner a tendance actuellement à augmenter.

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[80] Mémoire, annexe 28.

6. Envisagé ici comme une question utile au règlement du différend, le problème classique de la portée juridique des mesures conservatoires est donc également une question d'actualité. Or, l'examen dépassionné que l'on doit en faire permet le constat suivant : si la portée des mesures conservatoires alimente de longue date les débats doctrinaux, c'est en grande partie parce qu'on a eu tendance à en déformer la signification. Il est donc essentiel, au moins pour les besoins de la présente affaire, de réexaminer les termes d'un débat dont on trouve l'écho dans le contre-mémoire américain, avant de le débarrasser des confusions qui l'alimentent et occultent ses véritables enjeux.

7. Or, ces derniers sont considérables. Ils mettent tout simplement en cause l'efficacité de la fonction judiciaire pour ne pas même parler de l'autorité de la Cour. De la réponse apportée par vous à la requête allemande dépendra en tout cas non pas l'existence, mais, en tout cas et au minimum, l'aggravation de la responsabilité engagée par les Etats-Unis à l'égard de l'Allemagne.

8. Trois parties successives, donc, dans cette plaidoirie : le réexamen des termes ordinaires du débat (I), la signification véritable du caractère obligatoire des mesures conservatoires (II) et, enfin, la responsabilité des Etats-Unis du fait de la méconnaissance des mesures ordonnées le 3 mars 1999 (III).

I. Les termes ordinaires du débat

9. Comme dans toute joute académique, il y a les partisans et les adversaires du caractère obligatoire.

1. Les arguments hostiles à la reconnaissance du caractère obligatoire des mesures

10. Trois arguments sont à cet égard généralement avancés. Ils se fondent tour à tour sur les textes, sur la pratique des Etats, et même sur la jurisprudence de la Cour elle-même. On les retrouve dans le contre-mémoire des Etats-Unis. Examinons-les successivement.

11. a) *Les textes :* l'argument le plus communément employé pour contester le caractère obligatoire de vos ordonnances est aussi celui qui avoue le plus directement sa précarité. Il s'appuie sur la formule anglaise de l'article 41 de votre Statut. Faute de mieux, c'est bien entendu celui que les Etats-Unis ont privilégié dans leurs écritures, plus exactement aux paragraphes 141 et suivants, et chacun sait, ils le répètent, que l'article 41, paragraphe 1, se lit comme suit :

> *"The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."*

Et les Etats-Unis d'insister sur le *"indicate"* comme sur le *"ought to be taken"*, de même qu'ils attirent l'attention sur le fait que le paragraphe 2 du même article parle de mesures simplement *"suggested"* et pas *"ordered"* par la Cour.

12. A franchement parler, Monsieur le président, il n'y a rien là qui puisse effaroucher un Français, et je prie qu'on ne voie dans ce constat aucun chauvinisme ! En effet, comme tous les partisans du caractère obligatoire des mesures conservatoires le font remarquer, la version française du même texte parle bien, elle aussi, d'«indiquer» des mesures conservatoires; pourtant, ceci, dans la langue de Molière, peut s'entendre comme signifiant qu'elle «désigne» de telles mesures, sans emporter de conséquence sur le caractère obligatoire ou non d'une telle désignation. De plus, le texte français de l'article 41 dit que les mesures «doivent» (et non pas «devraient») «être prises à titre provisoire». Alors, il ne s'agit évidemment pas d'opposer Molière à Shakespeare, lesquels ont notamment l'humour en commun ! Mais il s'agit de rappeler que, dans le droit des Nations Unies et, plus encore, dans celui de la Cour depuis 1920, aucune des deux versions, anglaise ou française, non plus que celles des autres langues officielles des Nations Unies, n'a barre sur l'autre, même sur Internet ! Or, comme l'a montré le mémoire soumis à la Cour par l'Allemagne, ni la version chinoise, ni la version arabe, pas davantage que la version russe ou la version espagnole du texte de

l'article 41 du Statut ne viennent corroborer l'interprétation que le défendeur voudrait donner de cette disposition[81].

13. Les Etats-Unis sont d'ailleurs bien obligés d'admettre que l'article 41 est *"susceptible of different readings"*[82]. C'est d'ailleurs un très éminent auteur de langue anglaise, sir Gerald Fitzmaurice, qui, lui-même chaud partisan du caractère logiquement obligatoire des mesures conservatoires, faisait remarquer l'indigence de l'argument fondé sur le *"should"* et le *"ought"*[83].

14. b) *La pratique des Etats* : le contre-mémoire américain affirme : *"the practice of States also shows that the Court's indications of provisional measures have not been understood to impose binding legal obligations"*[84].

Alors, arrêtons-nous un peu sur la pratique des Etats. Elle est d'abord caractérisée par l'accroissement contemporain des demandes en mesures conservatoires : six pendant la Cour permanente de Justice internationale, contre trente-cinq à la Cour actuelle, dont, il est vrai, dix demandées d'un coup par la Yougoslavie contre les Etats membres de l'OTAN. Toujours est-il que dans les vingt-cinq dernières demandes on trouve seulement une période d'une vingtaine d'années. Etonnante pratique, si les Etats considèrent véritablement que les ordonnances de la Cour n'ont pas d'effet juridique ! Il est vrai qu'en un certain nombre de cas, bon nombre d'entre eux, dont les Etats-Unis à plusieurs reprises, n'ont pas fait grand cas des mesures effectivement ordonnées dans quatorze des vingt et un cas où la présente Cour avait été sollicitée. Mais la référence à des données purement statistiques fait peu de cas des différences entre Etats.

15. Il y a d'abord ceux qui demandent les mesures et puis il y a ceux qui les subissent, car les mesures ne sont souvent adressées pour l'essentiel qu'à l'une des deux parties au litige. Or, les Etats qui les demandent sont très attachés à leur autorité proprement juridique, et ainsi, lorsque les Etats-Unis eux-mêmes les sollicitaient de la Cour parce que les diplomates étaient pris en otage ! Il n'y a qu'à relire à cet égard l'extrême embarras, pour ne pas dire plus, manifesté par le

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[81] Mémoire, p. 151, par. 4.149.

[82] Contre-mémoire, p. 123, par. 153.

[83] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, vol. 2, p. 548-550.

[84] Contre-mémoire, p. 129, par. 161.

contre-mémoire lorsqu'il tente de réfuter les constatations faites dans les écritures allemandes, à propos des déclarations faites en 1980 par M. Owen, l'agent américain d'alors; il y parlait bien explicitement des *"obligations"* faites par la Cour à l'Iran dans cette affaire[85]. Lorsqu'ils se sentaient eux-mêmes menacés d'être frappés par des mesures du même ordre dans l'affaire des *Activités militaires et paramilitaires*[86], les Etats-Unis ont cherché à toute force à en écarter l'indication. Mais pourquoi manifester tant de craintes, Messieurs, à l'égard de mesures, si elles n'obligent à rien ?

16. Alors, il y a une seconde catégorie, c'est celle des Etats qui refusent les mesures parce qu'ils sont convaincus de l'absence de compétence de la Cour pour juger leur comportement au fond. C'est notamment le cas de l'Islande dans l'affaire des *Pêcheries islandaises*[87] ou de la France dans celle des *Essais nucléaires*. Ce dernier cas est d'ailleurs singulier, puisqu'en définitive, l'Etat défendeur a, peu de temps après, adopté un comportement parfaitement conforme à celui que la Cour attendait, en décidant lui-même qu'il renonçait aux essais nucléaires dans l'atmosphère. Enfin, troisième catégorie, souvent conjuguée à la précédente, il y a les cas dans lesquels certains Etats sont d'autant plus attachés à ne pas observer les mesures ordonnées qu'elles leur paraissent se confondre en réalité avec la satisfaction de la requête des demandeurs au fond. Alors s'ils n'ont pas obéi à la Cour, c'était non pas parce qu'ils auraient nié l'autorité des mesures conservatoires mais, tout au contraire, parce qu'ils trouvaient leur application trop efficace !

17. Au demeurant, l'argument qui prétend tirer du comportement des justiciables un enseignement sur l'autorité de la justice se trouve, tout au moins en droit international, parfaitement vicié. Pour la bonne raison qu'il repose sur une confusion : celle qu'il établit entre le caractère obligatoire d'un acte judiciaire et l'absence de compétence exécutoire de l'organe qui l'émet ! Cependant, les Etats-Unis eux-mêmes n'ont jamais respecté l'arrêt rendu au fond par la Cour dans l'affaire qui les opposaient au Nicaragua ! Et pourtant, personne ne songerait à nier que les

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[85] Contre-mémoire, p. 126, par. 157 et s.

[86] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 10 mai 1984, C.I.J. Recueil 1984*, p. 169.

[87] *Compétence en matière de pêcheries (Royaume-Uni de Grande-Bretagne et d'Irlande du Nord c. Islande), mesures conservatoires, ordonnance du 17 août 1972, C.I.J. Recueil 1972*, p. 12; *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), mesures conservatoires, ordonnance du 17 août 1972, C.I.J. Recueil 1972*, p. 30; *Essais nucléaires (Australie c. France), mesures conservatoires, ordonnance du 22 juin 1973, C.I.J. Recueil 1973*, p. 99; *Essais nucléaires (Nouvelle-Zélande c. France), mesures conservatoires, ordonnance du 22 juin 1973, C.I.J. Recueil 1973*, p. 99.

jugements de la Cour sont pourvus de l'autorité de chose jugée. La Cour a la compétence d'ordonner des mesures obligatoires mais elle n'a pas le pouvoir de les faire exécuter.

18. c) *La jurisprudence de la Cour :* le contre-mémoire des Etats-Unis considère que la Cour elle-même n'a pas, dans sa jurisprudence, indiqué qu'elle considérait les mesures comme obligatoires; avec la conséquence qu'elle ne s'est pas, non plus, prononcée sur la responsabilité juridique des Etats n'ayant pas observé ses prescriptions conservatoires. A l'appui d'une telle démonstration, les Etats-Unis citent curieusement l'affaire de l'*Anglo-Iranian Oil Company*, dans laquelle la Cour a déclaré que son ordonnance *"had ceased to be operative"*[88]. Mais on pourrait alors leur faire remarquer que si cette ordonnance avait cessé d'être *"operative"*, c'est bien qu'auparavant, elle l'avait été. De la même manière, il est étrange que les Etats-Unis croient trouver un secours dans l'observation faite par la Cour selon laquelle le Gouvernement français, dans l'affaire des *Essais nucléaires* aurait commis un *"deliberate breach of the Order"*[89]. Si la Cour parle alors de *("breach")*, n'est-ce pas précisément parce qu'elle reconnaît cet acte juridique comme posant des obligations ? Peu attentif à la présence du terme *"breach"* dans l'affaire précitée, le contre-mémoire tente en revanche de tirer argument de son absence dans le vocabulaire employé par la Cour dans l'affaire des *Otages*, lorsqu'elle constatait pour la regretter la méconnaissance de l'ordonnance qu'elle avait prise à l'intention de la République islamique d'Iran.

19. En dehors de cet usage assez inconséquent de votre jurisprudence, les auteurs du contre-mémoire s'abstiennent d'en faire un examen approfondi, notamment pour dresser un constat simple. Si vous ne vous êtes jamais prononcés sur l'engagement de la responsabilité internationale d'un Etat pour non-respect d'une ordonnance en mesures conservatoires, c'est tout simplement parce que, jusqu'à l'affaire *Breard*, aucun Etat ne vous l'avait demandé[90] ! Or, cette affaire *Breard* n'est jamais allée au fond, en raison du retrait de l'action paraguayenne.

20. L'examen de la jurisprudence permet en réalité de constater que, pour rédiger ses ordonnances, la Cour partait traditionnellement, comme il est logique, de la formulation prudente de l'article 41 de son Statut, dont elle reproduit le plus souvent les termes, en anglais ou en

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[88] Contre-mémoire, p. 130, par. 162.

[89] *Ibid.*, par. 163.

[90] Voir Luigi Daniele, *Le misure cautelari nel processo dinanzi alla Corte internazionale di giustizia*, 1993, p. 139.

français. Dans tous les cas, la Cour commence par indiquer de façon générique que les parties «veillent l'une et l'autre à éviter tout acte qui risquerait d'aggraver ou d'étendre le différend» ou que les parties «veillent l'une et l'autre à ce qu'aucune mesure soit prise qui puisse porter atteinte aux droits de l'autre partie». Puis, elle précise habituellement le comportement requis de l'une ou l'autre espèce.

21. Or, de ce dernier point de vue, la Cour semble avoir de plus en plus tendance, du moins si les circonstances l'exigent, à s'exprimer de façon plus ferme; cette tendance demeure cependant entravée par la différenciation terminologique existant entre le français et l'anglais. Prenons en deux exemples : dans l'affaire pendante entre la Bosnie et la Yougoslavie, la Cour a pris en 1993 une ordonnance dont le texte français dit ouvertement que la Yougoslavie «*doit* immédiatement ... prendre toutes les mesures en son pouvoir»[91]; elle réitère ce terme en ce qui concerne le devoir de la Yougoslavie de «veiller à ce que les forces militaires ou paramilitaires ... n'incitent ou ne se rendent complices du crime de génocide»[92]. Pour autant, l'original, en anglais, par déférence à l'égard de la version anglaise de l'article 41, s'en tient dans les deux cas à l'emploi du terme "*should*".

22. Bien plus, dans l'affaire presque sœur de celle qui nous occupe, l'ordonnance de la Cour dira bien en français que «les Etats-Unis *doivent* prendre toutes les mesures dont ils disposent pour que M. Angel Francisco Breard ne soit pas exécuté tant que la décision définitive en la présente espèce n'aura pas été rendue»[93]. Pourtant, là encore, le texte anglais dira que les Etats-Unis "*should take...*"

23. Tout se passe ainsi comme si, liée par l'équivoque linguistique établie dans son Statut, la Cour s'était sentie empêchée, lorsqu'elle jugeait pourtant que les circonstances l'exigeaient, de s'affranchir du vocabulaire qui lui est dicté par l'une et l'autre version de l'article 41. Mais ce qui compte, c'est de s'attacher à l'intention véritable de la Cour. Or il semble que, pour mieux encore le signifier, celle-ci ait décidé tout récemment de s'affranchir des équivoques qui pourraient être

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[91] *C.I.J. Recueil 1993, p. 24, par. 52.*

[92] *Ibid.*

[93] *Ordonnance du 9 avril 1998, C.I.J. Recueil 1998, p. 248, par. 41.*

entretenues, notamment par les pays destinataires de ses ordonnances, sur la clarté du sens à donner aux mesures qu'elle «ordonne».

24. Dans l'affaire des *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*, la Cour a rendu, le 1er juillet dernier, une ordonnance adressée aux deux parties au litige, dont l'original est en français. A l'unanimité de ses membres, elle «indique» certes, tout en déclarant et à trois reprises que «les deux Parties *doivent*, immédiatement, prévenir et s'abstenir...» On retrouve ici la terminologie existant dans la traduction française de l'anglais, que je viens de citer pour les affaires *Breard* et *LaGrand*.

25. Pourtant, comme pour mettre un terme aux discussions sur l'aptitude des mesures conservatoires à créer des obligations, la Cour a pris soin, au paragraphe 46 de cette ordonnance, de préciser qu'une «décision rendue en la présente procédure ne préjuge en rien la compétence de la Cour pour connaître du fond de l'affaire». «Décision», le terme est éclairant. Car la Cour n'ayant pas la compétence de modifier elle-même son propre Statut, cela signifie bien que si elle désigne, le 1er juillet 2000, une ordonnance en mesures conservatoires comme une «décision», c'est que tel était déjà le cas auparavant. Ce qui change en l'an 2000, c'est peut-être l'audace de la désignation mais pas la nature juridique de l'acte qu'elle concerne. Toute équivoque paraît d'ailleurs être levée, puisque, dans la version anglaise tirée de l'original français, en rompant avec une certaine habitude terminologique, la Cour a pris soin de traduire les termes «décision» et «doivent» par leurs exacts équivalents en anglais, *"decision"* et *"must"*. Par conséquent, la jurisprudence de la Cour autorise pleinement à constater la portée effectivement obligatoire des mesures conservatoires.

2. Les arguments favorables à la reconnaissance du caractère obligatoire des mesures conservatoires

26. Au demeurant, et je me tourne vers l'examen des opinions favorables à ce caractère obligatoire. Tout incite à confirmer le caractère obligatoire.

27. L'objet, tout d'abord. Il consiste à faire respecter, comme le disait la Cour, «le principe universellement admis devant les juridictions internationales d'après lequel les parties en cause doivent s'abstenir de toute mesure susceptible d'avoir une répercussion préjudiciable à l'exécution

de la décision à intervenir»[94]. Conservatoires, ces mesures le sont ainsi à plus d'un titre. Ce qui est à conserver, c'est l'objet même du différend, afin que la procédure judiciaire conserve un sens et une efficacité; c'est aussi «le droit de chacune des parties en attendant que [la Cour] rende sa décision», ce qui «présuppose qu'un préjudice irréparable ne doit pas être causé aux droits en litige dans une procédure judiciaire» on aura reconnu là les termes que vous avez vous-mêmes employés dans votre ordonnance en l'affaire *Breard*[95]. C'est cette finalité de l'action conservatoire qui justifie l'urgence et la priorité absolue donnée à des mesures de ce type, comme y insiste du reste l'article 74 de votre Règlement. On comprend, dès lors, que sir Gerald Fitzmaurice déclare : *"The whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding."*[96]

28. Mais, une fois opéré ce constat, que doit-on véritablement entendre par là ? C'est, trop souvent, pour ne pas avoir su percevoir la véritable portée du caractère obligatoire de ces mesures que plusieurs auteurs ont alimenté de manière assez vaine le débat doctrinal que l'on vient d'évoquer. Il est donc nécessaire à présent d'identifier la signification véritable du caractère obligatoire des contre-mesures.

II. La signification du caractère obligatoire des mesures conservatoires

29. Pour saisir cette signification, il convient d'analyser successivement deux aspects bien distincts que l'on aurait tort de confondre. Le premier concerne la nature juridique et les caractères des mesures elles-mêmes. Le second consiste à considérer la portée des obligations juridiques qu'elles énoncent. On examinera donc tour à tour ces deux éléments.

1. Nature et caractères des mesures conservatoires

30. Pour dire les choses en deux mots, Madame et Messieurs les juges, les mesures conservatoires ne sont pas des jugements, mais ce sont bel et bien des décisions juridiques.

31. a) *Ce ne sont pas des jugements.* On ne peut pas mettre totalement sur le même pied un jugement de la Cour intervenant sur sa compétence ou sur le fond et une mesure conservatoire. Les

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[94] Affaire de la *Compagnie d'électricité de Sofia, C.P.J.I. série A/B n°79*, p. 199.

[95] *C.I.J. Recueil 1998*, par. 35.

[96] Sir Gerald Fitzmaurice, *The Law and Procedure of the ICJ, op. cit*, p. 548.

premiers sont bien évidemment immédiatement revêtus de l'autorité de chose jugée en application de l'article 59 de votre Statut. L'un comme l'autre, les jugements sur la compétence ou sur le fond viennent clore soit une phase de la procédure, soit l'affaire elle-même. Ils constituent un aboutissement.

32. Au contraire, les mesures conservatoires ont un double caractère : elles sont à la fois incidentes et provisoires. Intervenues par définition dans l'urgence, elles veulent permettre la poursuite de la procédure, non la clore. Et c'est d'ailleurs bien la raison pour laquelle la Cour en use avec discernement, et refuse de les indiquer si les circonstances ne l'exigent pas ou si leur prononcé viendrait à préjuger de l'affaire au fond. Elle dispose en effet, du contrôle de l'opportunité d'accorder ces mesures. Cette différence entre jugements et mesures conservatoires explique la proposition de la Cour permanente dans l'affaire des *Zones franches*, lorsqu'elle disait : que «les ordonnances rendues par la Cour ... ne décident pas avec force «obligatoire» (art. 59 du Statut) et avec effet «définitif» (art. 60 du Statut) le différend que les parties ont porté devant [elle]»[97]. Pour préciser ainsi à cet égard la position de l'Allemagne telle qu'exprimée dans son mémoire, je dirais que l'article 59 et l'article 60 ne s'appliquent pas aux mesures conservatoires ou plus exactement qu'ils ne s'y appliquent que par implication; c'est-à-dire dans la mesure, à la fois incidentes et provisoires, où elles contribuent à l'exercice d'une fonction judiciaire dont le résultat final est, par définition, le prononcé d'une décision de justice. C'est là qu'il y a une logique inhérente à la procédure judiciaire dont la méconnaissance équivaudrait pour les parties à s'écarter de la bonne foi et de ce que les écritures allemandes appellent *"the principle of institutional effectiveness"*[98].

33. Des conclusions analogues paraissent pouvoir, *mutatis mutandis*, s'appliquer à l'égard de l'article 94 de la Charte dont il est exact qu'il ne vise pas, d'abord, l'application des mesures conservatoires. Ainsi l'exige une interprétation à la fois raisonnable et réaliste des termes de votre Statut comme de ceux de la Charte. Il demeure que, pour parvenir à cet arrêt obligatoire et définitif visé par les dispositions précitées, les circonstances exigent parfois que votre juridiction ait recours à de telles mesures dont le respect participe ainsi à la construction du jugement obligatoire. Une

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[97] Affaire des *Zones franches, C.P.J.I. série A nº 22*, p. 13.

[98] Mémoire, p. 137 et suiv.

mesure conservatoire ne rend pas la justice, mais elle permet de la rendre. Et le fait qu'elle revête un caractère provisoire n'altère évidemment en rien son aptitude à créer une obligation juridique, pas plus que n'est remise en cause cette obligation par le fait que vous n'avez pas à votre disposition de puissance exécutoire.

34. b) *Au demeurant, je l'annonçais, les mesures conservatoires ne sont pas des jugements mais ce sont des décisions.* Et ces décisions sont à bien des égards très proches sinon tout à fait assimilables aux ordonnances que la Cour rend «pour la direction du procès, la détermination des formes et délais dans lesquels chaque partie doit finalement conclure» ou pour organiser «l'administration des preuves», toutes mesures décisoires énoncées à l'article 49 de votre Statut. Ce sont, en d'autres termes, des décisions de procédure, non des décisions de jugement. Elles participent à l'administration de la justice, elles ne la rendent pas.

35. Ainsi, décisions de procédure et non décisions de jugement, les mesures conservatoires sont bel et bien des décisions juridiques comme le constatent d'ailleurs les exégètes les plus acerbes de votre Statut, tels sir Gerald Fitzmaurice ou le professeur Shabtai Rosenne, ce dernier dans son ouvrage classique, *The Law and Practice of the International Court of Justice*[99].

36. C'est ici qu'il faut faire justice d'un curieux fantasme qui visite périodiquement une certaine doctrine quelque peu hallucinée. C'est la thèse, reprise faute de mieux par les écritures américaines, d'après laquelle l'obligation énoncée par la Cour dans une telle ordonnance serait purement une «obligation morale». Voilà une idée, qu'on me permette de le dire, qui me paraît manquer singulièrement de fondement ! On voit mal, en effet, par quelle mystérieuse alchimie la Cour se résoudrait tout d'un coup à faire la morale aux parties pour les besoins de la sauvegarde d'intérêts pourtant proprement juridiques : «Allons donc, dirait la Cour aux parties en litige sur un ton patelin, mettez-y du vôtre, soyez gentils... Faites donc ce que je vous demande pour ne pas envenimer les choses...» Cela n'est pas sérieux ! Il n'y a qu'un cas et un seul, du reste jamais réalisé en pratique, dans lequel vous êtes autorisés à faire autre chose que du droit. Ce cas, resté singulier, c'est celui dans lequel les parties vous demanderaient de statuer *ex aequo et bono*, en application de l'article 38, paragraphe 2. Le reste du temps, la Cour ne fait qu'une chose; elle fait

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[99] 2e éd., 1985, p. 125.

du droit ! Ce qui ne l'empêche d'ailleurs nullement en tant qu'institution, de jouir d'une grande autorité morale. C'est du reste ce que concluait sir Hersch Lauterpacht lorsqu'il déclarait : "*It cannot be lightly assumed that the Statute of the Court — a legal instrument — contains provisions relating to any merely moral obligations of States.*"[100]

36. S'il avait pu, au demeurant, subsister le moindre doute dans l'esprit de certains sur la nature des mesures conservatoires en tant que «décisions» portant obligations juridiques, il devrait en tout cas être désormais levé par le caractère très explicite de cette qualification de «décision», appliquée par la Cour elle-même aux mesures conservatoires qu'elle a rendues le 1^{er} juillet de l'an 2000, dans l'affaire pendante entre le Congo et l'Ouganda[101].

37. Pour conclure sur le nature juridique de cet acte juridique, on peut donc faire selon nous le bilan suivant : les mesures conservatoires sont à distinguer des jugements; elles sont bien des décisions juridiques, mais des décisions de procédure (même si elles peuvent elles-mêmes comporter un contenu substantiel. Leur caractère décisoire étant cependant impliqué par la logique de l'urgence et la nécessité de sauvegarder l'efficacité de la procédure, elles créent par conséquent des obligations proprement juridiques à la charge de leurs destinataires. Arrivés à ce stade de l'analyse, il convient par conséquent d'examiner la portée exacte de ces obligations juridiques.

2. La portée des obligations créées par les mesures conservatoires

38. J'analyserai d'abord, d'un point de vue général, la portée de toutes mesures conservatoires, avant d'examiner plus précisément celles que la Cour a adressées aux Etats-Unis dans la présente affaire.

39. *a)* Ainsi qu'on l'a déjà observé plus haut, la Cour procède habituellement en deux temps dans l'énonciation des mesures conservatoires. Elle commence par rappeler «à l'une et l'autre partie l'obligation de prévenir et de s'abstenir de tout acte qui risquerait de porter atteinte aux droits de l'autre partie», et il s'agit là d'une obligation à la fois réciproque et générique, que l'on pourra d'ordinaire, en fonction de sa formulation presque standardisée, assimiler à une obligation générale

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[100] Sir Hersch Lauterpacht, "*The Development of International Law by the Court*", *op. cit.*, p. 253.

[101] Ordonnance du 1^{er} juillet 2000, *op. cit.*, par. 46.

de diligence, due par les parties l'une à l'autre, comme, par l'une et l'autre, à la Cour elle-même, en tant qu'elle est gardienne du procès.

40. Les moyens de réalisation de cette obligation, comme il en va toujours en matière de diligence, sont laissés, sinon toujours à l'entière discrétion, du moins à l'intelligence raisonnée que chacun des deux Etats pourra se faire de la situation et du comportement qu'elle impose, en fonction du même but, lui aussi général mais pourtant clairement défini : ne pas porter atteinte aux droits de l'autre partie ni ruiner le sens ou l'efficacité de l'arrêt à venir. Mais ce n'est pas parce qu'une obligation est formulée en termes généraux qu'elle cesse d'être une obligation. Il est au contraire inhérent à toute obligation de diligence de renvoyer implicitement à des standards de comportement dont il appartient à chaque "well governed State", pour parler comme les arbitres dans l'affaire de l'*Alabama*, d'apprécier et de mettre en œuvre les implications concrètes compte tenu des données de l'espèce.

41. Alors au-delà de cette indication de mesures générales, il arrive le plus souvent que la Cour désigne plus précisément, par des mesures particulières, un comportement déterminé ou un résultat spécifique à atteindre. Dans ce cas, l'ordonnance pourra passer à la formulation d'obligations plus précisément déterminées, ce qui ne veut pas dire qu'elles cesseront d'être des obligations de diligence.

42. En voici encore quelques illustrations :

> «La Yougoslavie doit … immédiatement prendre toutes les mesures en son pouvoir afin de prévenir la commission du crime de génocide…»[102];
>
> «les Etats-Unis doivent prendre toutes les mesures dont ils disposent pour que M. Breard ne soit pas exécuté…»[103];
>
> «les deux Parties doivent, immédiatement, prendre toutes mesures nécessaires pour assurer, dans la zone de conflit, le plein respect des droits fondamentaux de l'homme ainsi que des règles applicables du droit humanitaire»[104].

Dans tous ces cas, on constate que, tout en devenant plus spécifiée dans son contenu, l'obligation énoncée laisse toujours une marge d'appréciation aux Parties en fonction du but cette fois plus précisément défini.

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[102] *C.I.J. Recueil 1993, p. 24*, par. 52.

[103] *C.I.J. Recueil 1998, ordonnance du 8 avril*, par. 41.

[104] Ordonnance du 1er juillet 2000, par. 47, 3.

44. Cette marge laissée aux Etats qui, pour autant, leur impose une obligation déterminée, nous paraît très exactement reflétée dans l'expression employée notamment par la Cour dans l'affaire jugée en 1986 entre le Nicaragua et les Etats-Unis, lorsqu'elle indiquait, et je vais citer le texte anglais pour que l'on ne puisse pas nous accuser de jouer sur la différence terminologique des versions anglaise et française :

> ***"When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indication seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights."***[103]

45. Au demeurant, la marge de manœuvre laissée à l'Etat destinataire est également laissée à la Cour elle-même, dans l'appréciation qu'elle pourra être amenée à faire de la conformité du comportement de cet Etat à l'objectif qui était de lui requis. Elle pourra elle-même tenir en compte la balance des intérêts de part et d'autre en jeu, comme du degré d'intensité de l'urgence, d'un coté, ou l'incidence de l'application des mesures spécifiques sur la situation de l'Etat qu'elles visent, de l'autre.

46. La Cour pourra ainsi doser non seulement la mesure de l'autorité avec laquelle elle ordonne, mais la souplesse des critères en fonction desquels elle appréciera ensuite la mesure dans laquelle l'Etat ou les Etats visés s'est ou se sont acquittés de leur obligation. Et l'on peut penser que c'est précisément la flexibilité inhérente à ce type de mesures qui se trouve reflétée dans le vocabulaire pondéré qu'utilise la version anglaise de l'article 41 du Statut.

47. *b)* Il est alors particulièrement instructif de se tourner vers l'ordonnance prise par la Cour dans notre affaire *LaGrand*, que je cite, pour les mêmes raisons, dans l'original anglais *: "The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings"*. Quels sont ici le sens et la portée du comportement requis des Etats-Unis par l'ordonnance ? S'agissait-il de leur ordonner la renonciation à une compétence inhérente à leur souveraineté, dont on pourrait admettre qu'elle froisse un intérêt juridique déterminé, ce qui aurait pu inciter les Etats-Unis à n'en faire qu'un usage *a minima* ? Il ne le semble pas. Par cette décision incidente qu'est une ordonnance, la Cour demandait simplement aux Etats-Unis non de renoncer à l'exercice d'une compétence mais,

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[103] *C.I.J. Recueil 1986, p. 144,* par. 289.

simplement, d'en suspendre la mise en œuvre pour un temps limité, pure obligation d'abstention qui ne mettait en péril aucun intérêt majeur ou fondamental d'un Etat souverain. Il est, certes, des cas dans lesquels laisser passer du temps peut causer un préjudice.

48. Ce sont les cas, en matière économique ou commerciale, dans lesquels le temps, c'est de l'argent ! Mais ici, le temps aurait juste coûté le prix d'une prolongation de résidence dans les couloirs de la mort, avec, comme contrepartie, la possibilité de laisser encore une chance à la vie. Eloquente, en effet, est ici la balance des intérêts en présence, en fonction desquels la Cour peut apprécier dans quelle mesure l'Etat *took* "the Court's indication seriously into account, and [did not] direct its conduct solely by reference to what it believes to be its rights". D'un coté les Etats-Unis, dont les intérêts juridiques fondamentaux n'auraient été mis en cause par l'adjonction d'une douzaine de mois nécessaires à l'instruction du procès international, après dix-sept ans passés par les frères LaGrand en prison. De l'autre, le respect des droits d'un autre Etat souverain, l'Allemagne, dans son propre chef comme dans celui de ses ressortissants. D'un coté, la suspension passagère de l'exercice d'une compétence judiciaire; de l'autre la possibilité, compte tenu de l'enjeu propre à l'espèce, de donner une ultime chance au «droit à la vie» en tant qu'il constitue, au sens technique du terme, un droit fondamental de la personne humaine défini de façon convergente dans suffisamment de conventions internationales pour qu'on puisse s'autoriser à y voir une norme de droit international coutumier sinon même de droit impératif, comme semblait y incliner, pour sa part, dans ses écrits le professeur Théodore Meron[106].

50. La position de la République fédérale d'Allemagne, Monsieur le président, Madame et Messieurs les juges, est ainsi que, dans les conditions de l'espèce, compte tenu de la nature juridique des mesures conservatoires en général et du contenu des obligations faites par celle que vous avez prise le 3 mars 1999, les Etats-Unis avaient un comportement simple mais unique à adopter : s'abstenir d'exécuter Walter LaGrand et suspendre son exécution pendant la durée de l'instance. En ignorant de façon délibérée votre ordonnance, les Etats-Unis ont donc engagé leur responsabilité internationale; en se contentant purement et simplement de transmettre le texte aux autorités d'Arizona, les Etats-Unis n'ont pas respecté leur obligation juridique de «prendre toutes

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[106] Th. Meron, Human Rights and Humanitarian Norms as Customary Law, p. 193-194.

les mesures à leur disposition pour éviter que Walter LaGrand soit exécuté pendant la durée de la présente affaire». D'autres organes agissant au nom des Etats-Unis ont eu un comportement encore plus délibérément méprisant à l'égard des mesures conservatoires indiquées par la Cour. C'est, tout d'abord, le *Solicitor-General*, qui a purement et simplement maintenu la position qu'il avait adoptée lors de l'affaire *Breard*, selon laquelle les mesures conservatoires n'obligent en rien les Etats-Unis. C'est ensuite la Cour suprême des Etats-Unis, elle aussi pourtant informée par le précédent encore tout récent de l'affaire *Breard*, qui a également réitéré une attitude signifiant clairement que le droit des Etats-Unis, tel qu'elle-même l'interprète, prime le droit international public. Cette attitude a été radicalement critiquée par plusieurs éminents jurisconsultes américains, dont le professeur Louis Henkin[107] dans les colonnes de l'*American Journal of International Law*, ou M. Keith Heighet[108] dans le dernier article qu'il ait écrit, M. Keith Heighet, en compagnie duquel je plaidais la dernière fois que je suis apparu devant cette Cour. L'un et l'autre ont insisté sur le caractère obligatoire en droit international des mesures conservatoires indiquées par la Cour dans l'affaire *Breard*, qui étaient pour l'essentiel identiques à celles de la présente affaire. Ils l'ont fait eu égard aux dispositions constitutionnelles américaines comme par référence à la règle de droit international élémentaire selon laquelle un Etat est engagé par les actes de ses organes.

51. J'ajoute que s'il peut y avoir des cas dans lesquels un Etat, compte tenu des circonstances de l'espèce, peut considérer que la Cour lui laisse une certaine marge d'appréciation à laquelle nous sommes référés, il n'y avait, ici, aucun doute possible sur le caractère strict du devoir imparti au défendeur. Il faut en effet rappeler ce par quoi j'avais tout à l'heure commencé : la singularité absolue, radicale, sans aucun précédent, d'une ordonnance en mesures conservatoires rendue *proprio motu* cela ne laissait aucune espèce d'ambiguïté sur l'importance et l'autorité que la Cour, agissant à l'unanimité, accordait au respect de la simple mesure d'abstention qu'elle ordonnait, compte tenu de l'extrême urgence de la situation et de l'enjeu littéralement vital attaché à sa réalisation. Pour reprendre les termes employés en commentaire à l'affaire *Breard* par

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[107] Louis Henkin, "*Provisional Measures, U.S. Treaty Obligations and the States*", in : *AJIL* 1998, vol. 92, p. 679-683.

[108] Keith Highet, "*The Emperor's New Clothes : Death Row Appeals to the World Court ? The Breard Case As a Miscarriage of (International) Justice*", in *Essays in Memoriam Judge José Maria Ruda*, Universidad Austral, 2000; reproduit dans le mémoire, annexe 39, p. 765 et suiv.

Keith Highet : *"the death row situation is the quintessential instance where an order indicating provisional measures from the ICJ could have been applied, but was not"*. Il est par conséquent indispensable à ce stade de l'analyse d'en venir, et cela clôturera ma plaidoirie, à l'examen des conséquences juridiques pour les Etats-Unis de la méconnaissance des mesures conservatoires du 3 mars 1999.

III. Les conséquences juridiques pour les Etats-Unis de la méconnaissance des mesures conservatoires du 3 mars 1999

52.

> «Le principe essentiel qui découle de la notion même d'acte illicite et qui semble se dégager de la pratique internationale ... est que la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait existé si ledit acte n'avait pas été commis.»[109]

Dès le début de la citation j'aurais pu l'interrompre, vous la connaissez évidemment tous par cœur, et ce rappel du dictum de la Cour dans l'affaire de l'*Usine de Chorzów* n'est pas ici pour sacrifier à un rituel trop bien rodé, mais pour fixer les termes de la situation juridique à analyser. La Cour a ordonné le 3 mars 1999 aux Etats-Unis d'adopter un comportement qui, en l'occurrence, ne leur laissait d'autre option qu'une application stricte de la décision dont ils étaient destinataires. Son contenu était au demeurant peu contraignant, il se résolvait dans la suspension provisoire d'une compétence pénale. Les Etats-Unis ont passé outre; et, ce faisant, ils ont interféré avec l'objet même du différend au fond alors que la procédure judiciaire internationale était en cours. Il en résulte qu'ayant commis un nouveau fait illicite, ils ont créé un nouveau chef de responsabilité internationale à leur charge; cette responsabilité est nouvelle, parce que fondée sur des agissements distincts de ceux qui leur étaient reprochés dans la requête. Mais elle demeure évidemment étroitement corrélée à la responsabilité engagée au fond et il convient de le rappeler brièvement.

Lien de la responsabilité pour méconnaissance de l'ordonnance avec la responsabilité au fond

53. En rendant son ordonnance, la Cour a démontré qu'elle n'avait de doute ni sur l'existence *prima facie* des droits du demandeur ni sur celle d'un risque de préjudice irréparable. Les premiers étaient fondés sur le fait que l'article 5 de la convention de Vienne de 1963 donne à

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[109] Affaire de l'*Usine de Chorzów, C.P.J.I. série A nº 17*, p. 47.

toute Partie «le droit de protéger dans l'Etat de résidence les intérêts de l'Etat d'envoi et de ses ressortissants, personnes physiques ou morales...» Ils sont aussi fondés sur les droits de l'Allemagne sur la base de l'article 36, dont je ne reprendrai pas ici l'analyse. Je m'arrêterai en revanche sur le constat que vous avez fait le 3 mars 1999 de l'existence d'un risque de préjudice irréparable. Qu'entend-on exactement par-là ? Le préjudice causé est réalisé par l'impossibilité dans laquelle se trouve désormais l'Allemagne de demander la *restitutio in integrum*. Ce préjudice est irréparable non en ce qu'aucune réparation ne serait désormais allouable à l'Allemagne, mais dans le fait qu'aucune réparation ne pourra jamais «rétablir l'état qui aurait existé si ledit acte n'avait pas été commis».

54. En d'autres termes, tant que Walter LaGrand n'était pas été exécuté et si la Cour avait pu examiner la question de savoir si les Etats-Unis avaient ou non violé l'article 36 de la convention, la possibilité demeurait entière, au cas où vous feriez droit aux requêtes allemandes, que la procédure soit reprise devant les juridictions américaines; mais, cette fois, dans le respect des droits de l'Allemagne et de ceux que ses ressortissants. *Last but not least*, il eût pu très bien advenir que, pourvu de meilleurs avocats, averti en temps voulu de ses droits, Walter LaGrand puisse avoir la vie sauve. Son exécution dès le début de l'instance ne vide pas celle-ci de son objet, mais la rend impropre à un rétablissement des choses en l'état où elles étaient avant la commission des faits illicites américains.

55. On constate ainsi que les droits que possède l'Allemagne à voir respectées les obligations des Etats-Unis à son égard et ceux qu'elle exerce dans le chef de ses ressortissants par l'exercice de la protection diplomatique manifestent l'existence d'un lien direct; entre la vie de l'un de ses ressortissants et l'intérêt juridique propre à l'Allemagne. Il n'est donc ici nullement question de faire jouer à la Cour le rôle d'une cour d'appel internationale en matière criminelle, on y a suffisamment insisté.

56. Depuis l'exécution de Walter LaGrand, le différend juridique subsiste entre les deux Parties, d'abord sur l'interprétation et l'application de l'article 36 de la convention de Vienne de 1963 et sur la responsabilité encourue par les Etats-Unis du fait de sa violation à l'égard de l'Allemagne. Mais la violation par les Etats-Unis de cette disposition a finalement abouti à un préjudice ultime que rien ni personne ne pourra désormais effacer. Une simple réparation par cette

forme atrophiée et quelque peu méprisante de la satisfaction à laquelle procèdent les Etats-Unis ne saurait, dans ces conditions suffire, d'autant qu'ils ont déjà montré par le passé combien ils se sentaient peu engagés dans l'avenir, l'exécution toute récente de M. Flores vient encore de le montrer. Chacun conviendra qu'il est d'ailleurs totalement insatisfaisant, précisément, que cet Etat, pour la seconde fois consécutive, méconnaisse l'article 36, les droits d'un Etat et ceux de son ressortissant, puis ignore les mesures conservatoires ordonnées par la Cour en produisant un dommage ainsi irréparable, avant de s'estimer quitte au regard du droit international en reconnaissant qu'il a commis une infraction. Je viole le droit, j'ignore les mesures ordonnées par la Cour, j'exécute, au suivant… !

IV. Conclusion

57. Pour conclure, Monsieur le président, Madame et Messieurs les juges, je ferai deux observations, dont la première concerne la portée des mesures conservatoires et la seconde, les conséquences de leur violation, l'une et l'autre dans les circonstances propres à la présente espèce.

58. *a)* En premier lieu, l'affaire *LaGrand* illustre de façon toute pertinente l'opportunité qu'il y a à achever de lever toute ambiguïté sur la portée des mesures conservatoires, en un temps où beaucoup d'Etats n'ont que trop tendance à répandre l'idée que la Cour serait à cet égard moins bien équipée que d'autres juridictions internationales. En réalité, les mesures conservatoires constituent de véritables décisions de procédure, distinctes des décisions de jugement que sont les arrêts mais étroitement liées à ces décisions de jugement par leur objet, qui est de sauvegarder les droits des parties comme l'objet du différend.

59. En l'occurrence, la perspective d'un dommage proprement irréparable, tant parce qu'il rendait impossible la *restitutio in integrum* que parce qu'il a porté atteinte à la vie humaine rendait l'ordonnance du 3 mars 1999 d'application stricte; et ceci dit, d'autant plus que la balance des intérêts en présence ne mettait à la charge des Etats-Unis qu'une simple obligation temporaire d'abstention.

60. *b)* Ma seconde observation est pour affirmer que la conséquence de la violation d'un droit est toujours l'engagement de la responsabilité internationale. La responsabilité engagée par les Etats-Unis en méconnaissance de votre ordonnance, distincte de leur responsabilité pour les

atteintes à l'article 36 mais corrélée à elle peut difficilement être envisagée de façon totalement autonome. Il résulte que, pour avoir causé un dommage irréparable au demandeur, cette responsabilité doit au minimum être considérée pour ce qu'elle est, c'est-à-dire un très sérieux élément d'aggravation de la responsabilité initiale des Etats-Unis pour méconnaissance des articles 36, paragraphes 1 et 2. Il devrait en résulter en particulier que la forme de la réparation due par les Etats-Unis à l'Allemagne ne peut se résoudre dans les espèces exsangues de la satisfaction atrophiée concédée par les Etats-Unis.

Monsieur le président, ainsi s'achève la première phase de la plaidoirie orale de l'Allemagne dans l'affaire *LaGrand*. Je remercie la Cour de l'attention qu'elle a bien voulu nous prêter pendant cette longue journée.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. La séance de la Cour est levée. Nous reprendrons nos travaux demain à 10 heures pour écouter la plaidoirie des Etats-Unis d'Amérique.

L'audience est levée à 17 h 50.

CR 2000/28

International Court of Justice
THE HAGUE

Cour internationale de Justice
LA HAYE

YEAR 2000

Public sitting

held on Tuesday 14 November 2000, at 10 a.m., at the Peace Palace,

President Guillaume presiding

in the LaGrand Case
(Germany v. United States of America)

VERBATIM RECORD

ANNÉE 2000

Audience publique

tenue le mardi 14 novembre 2000, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président

en l'affaire LaGrand
(Allemagne c. Etats Unis d'Amérique)

COMPTE RENDU

Present:	**President**	**Guillaume**
	Vice-President	**Shi**
	Judges	**Oda**
		Bedjaoui
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
	Registrar	**Couvreur**

The Government of the Federal Republic of Germany is represented by:

Mr. Gerhard Westdickenberg, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Eberhard U. B. von Puttkamer, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Bruno Simma, Professor of Public International Law at the University of Munich,

as Co-Agent and Counsel;

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and at the European University Institute in Florence,

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Hans-Peter Kaul, Head of the Public International Law Division, Federal Foreign Office,

Dr. Daniel Khan, University of Munich,

Dr. Andreas Paulus, University of Munich,

as Counsel;

Dr. Eberhard Desch, Federal Ministry of Justice,

Dr. S. Johannes Trommer, Embassy of the Federal Republic of Germany in the Netherlands,

Mr. Andreas Götze, Federal Foreign Office,

as Adviser;

Ms Fiona Sneddon,

as Assistant.

The Government of the United States of America is represented by:

Mr. James H. Thessin, Acting Legal Adviser, United States Department of State,

as Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

as Deputy Agents;

The Honourable Janet Napolitano, Attorney-General, State of Arizona,

Professor Michael J. Matheson, Professor of International Law, School of Advanced International Studies, Johns Hopkins University; former Acting Legal Adviser, United States Department of State,

Professor Theodor Meron, Counsellor on International Law, United States Department of State; Charles L. Denison Professor of International Law, New York University; Associate Member of the Institute of International Law,

Professor Stefan Trechsel, Professor of Criminal Law and Procedure, University of Zurich Faculty of Law,

as Counsel and Advocates;

Professor Shabtai Rosenne, Member of the Israel Bar; Honorary Member of the American Society of International Law; Member of the Institute of International Law,

Ms Norma B. Martens, Assistant Attorney-General, State of Arizona,

Mr. Paul J. McMurdie, Assistant Attorney-General, State of Arizona,

Mr. Robert J. Erickson, Principal Deputy Chief, Appellate Section, Criminal Division, United States Department of Justice,

Mr. Allen S. Weiner, Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

Ms Jessica R. Holmes, Attaché, Office of the Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

as Counsel.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte, et je donne immédiatement la parole à M. James Thessin, Acting Legal Adviser, United States Department of State.

Mr. THESSIN:

1.1. Thank you, Mr. President. Members of this Court. Learned friends of the Federal Republic of Germany. Ladies and Gentlemen.

1.2. I am honoured to appear as the Agent of the United States. My colleagues and I are here to assist this Court to understand the facts and legal principles that underlie a dispute between the United States and Germany.

1.3. Because this dispute came before this Court in the most gripping of circumstances, when an individual faced imminent execution for murder, it is easy to stray from the central issues of the case before us. But as international lawyers and jurists, we must retain our focus on the fundamental facts and legal principles.

1.4. Allow me to summarize what this case is about and what it is not about. My colleagues will follow with greater detail. With your permission, Mr. President, counsel will not read the full citations that support our arguments, but they are included in the texts provided to the Court and to opposing counsel.

The issues of the case

1.5. This case is about the interpretation and application of the Vienna Convention on Consular Relations and nothing else. While it bears the name *LaGrand Case (Germany* v. *United States of America)*, the case concerns only the dispute between the United States and Germany arising out of the application of the Vienna Convention on Consular Relations. Everything else in the German claims and submissions is outside the jurisdiction of the Court under the Optional Protocol.

1.6. The United States and Germany agree with respect to two central matters in the case. First, we agree that the Consular Convention required the competent authorities to inform Walter and Karl LaGrand without delay that each had a right to have those authorities notify German consular officials of his arrest. And second, we agree that the competent authorities did not inform either of the LaGrands of this right.

1.7. Germany and the United States disagree, on the other hand, on what obligation the United States bears for this breach. The United States believes that this breach has been properly remedied by the appropriate satisfaction it has already given[1].

1.8. First, the United States has acknowledged that its authorities did not inform Walter and Karl LaGrand of their right to consular notification as required by Article 36, paragraph 1 *(b)*, of the Consular Convention. We made this acknowledgment even though the failure was based upon a good faith mistake arising in complex circumstances and in our view created no prejudice.

1.9. Second, the Department of State, on behalf of the United States, has extended its sincere apologies and deep regrets to the Government of Germany for the breach of the United States obligation under Article 36, paragraph 1 *(b)*, in the cases of Karl and Walter LaGrand. I have no hesitation, Mr. President, reiterating that apology here again before this Court.

1.10. Third, the Department has assured Germany that the United States recognizes that compliance with consular notification requirements must be improved and that it is engaged in a comprehensive effort to this end.

1.11. We have the highest interest in improving compliance with the Consular Convention. US nationals travel to every corner of the world. Without a properly functioning international system of consular notification, our consular officials abroad cannot fully perform their functions. Accordingly, our commitment to improve our performance in this area is genuine and continuing.

1.12. To improve our effort, the United States invited Germany in the Note of 18 February 2000 to tell us promptly of any case in which Germany believed that a failure of consular notification may have occurred. Germany did not respond to that Note, but on 26 October it did file with this Court a list of cases it apparently believes involved failures to provide consular notification. Last-minute allegations without opportunity for the United States to review cannot fairly support a conclusion that the United States flagrantly disregards Article 36. In light of the late date on which the Court admitted the new documents, the Court should attach no evidentiary weight to their admission.

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[1] 1.8. These steps are described in detail in the first two Documentary Exhibits to the United States Counter-Memorial: the Note of 18 Feb. 2000 from the Department of State to the Embassy of the Federal Republic of Germany (Exhibit 2), and the Report of Investigation, dated 17 Feb. 2000, that was attached to the Note (Exhibit 1).

1.13. Mr. President, this dispute with Germany should have been resolved when the United States took these several steps. As the Court will hear today, this resolution is consistent with the Consular Convention. This resolution is consistent with State practice; and this resolution is consistent with the law of State responsibility. No further reparation by the United States is necessary or appropriate in the circumstances of this case.

1.14. Germany has not done more for its breaches when Germany failed to notify US nationals in a timely way of their consular rights, nor has the United States asked Germany to do more in those cases.

1.15. Germany, on the other hand, has a much more expansive view on what remedy the United States owes for its failure to notify the LaGrands. Germany asks that the Court determine that the executions were wrongful, when Germany does not show that the lack of notification undermined in this case the fairness of these two trials or the full consideration of mitigating factors. Germany asks for guarantees of non-repetition, when Germany itself has less than a perfect record. Germany asks for special rules for death penalty cases, even though the Vienna Convention makes no such distinction.

1.16. In effect, Germany asks this Court to create additional obligations to which the Parties have not agreed. Neither the interests of Germany, nor the interests of the United States, nor the interests of the international community as a whole, are served if this Court accepts Germany's invitation to distort the requirements of the Consular Convention and exaggerate the remedies for its violation.

1.17. We believe a way forward exists for the Court: to determine that the actual dispute between the Parties — the violation of an obligation owed Germany to inform the LaGrands of their right to consular notification — has been resolved by the United States apology and appropriate assurances of non-repetition, making the case in that sense moot. Germany's other claims are speculative and derivative and do not stand on their own.

Issues not before the Court

1.18. This proceeding does not require the Court to address several other matters that Germany spent substantial time discussing yesterday.

1.19. *Criminal systems of States.* As the Court itself has wisely stated, the function of this Court is to resolve international legal disputes between States and "not to act as a court of criminal appeal"[2]. Instead, the Court's role focuses on the interpretation and application of international conventions. Thus, we must not allow Germany to lead us into examining again the competency of counsel, analysing newly manufactured allegations of racial discrimination, and restructuring the United States criminal system.

1.20. The Consular Convention cannot properly be read to dictate to a State how its domestic judicial system is to be structured. Germany, in effect, has invited this Court to create a new international legal obligation, one that would necessarily intrude deeply into the domestic criminal justice system of any State that imposes punishment for any crime, whenever a violation of consular notification occurs. Mr. President, Members of this Court, the German position would involve this Court in legislation, not interpretation, and would require this Court far to exceed its proper judicial role.

1.21. Although we oppose Germany's efforts to expand this case, this is not because we fear such an enquiry. In fact, with the single exception of the violation of the duty to inform the LaGrands, the United States has acted in full accordance with state, federal and international law at all stages of the proceedings, before Arizona courts, before federal courts and before this Court. At the sentencing hearing, advocates for the LaGrands brought forward mitigating facts from their earliest childhood days in Germany. The LaGrands were treated in every manner as if they had been United States citizens, which many officials, and even at least one of the LaGrand brothers, thought was the case. Germany's impact at best on this case would have been cumulative of this exhaustive process. As Judge Oda stated,

> "if consular contact had occurred at the time of Mr. Walter LaGrand's arrest or detention, the judicial procedure in the United States domestic courts relating to his case would have been no different"[3].

1.22. Despite Germany's harsh condemnation of the United States legal system in its Memorial and in its oral presentations, and before any need existed to sustain its questionable claims in this Court, the highest authorities of Germany, President Herzog and the Minister of Justice, who surely speak for Germany in the most authoritative way, have paid tribute to the fairness of the procedures involved in the LaGrand case. President Herzog specifically wrote, in the translation provided by Germany: "In no way do I doubt the legitimacy of the conviction nor the fairness of the procedures before the courts of the State of Arizona and the federal courts." The Minister of Justice wrote to similar effect:

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[2] Order of 3 March 1999, *LaGrand Case (Germany v. United States)*, para. 25.

[3] *LaGrand Case (Germany v. United States of America)*, Order of 3 March 1999, declaration of Judge Oda, para. 4.

> "[N]or are there any doubts about the fact that the proceedings were conducted under the Rule of Law — ultimately leading to the imposition of the death penalty with final and binding effect — before the courts of the State of Arizona and before the Federal Courts."

The LaGrands — to cite the Minister of Justice — committed "dreadful crimes" marked with "particular brutality".

1.23. *Good faith*. Nor is the good faith of the United States properly in doubt. The Report of Investigation (at Exhibit 1) describes in considerable detail the circumstances surrounding the arrest of the LaGrand brothers, including the confusion that existed with respect to their nationalities, and explains the manner in which the violation of the duty to inform took place. In a country of immigrants where most residents trace their roots to other countries, in a country without national identity cards, the United States goes to great lengths to avoid divisions between citizens and non-citizens. Distinguishing citizens from non-citizens is therefore often difficult. The United States delegation, for example, has advocates born in Germany, Poland and Switzerland and another whose ancestors immigrated from Germany; only one of us is not a citizen. The implication that Arizona authorities negligently or deliberately violated the duty to inform the LaGrand brothers is insupportable.

1.24. The US efforts to address the violation in this case to the best of its ability, however, were seriously complicated by the late date at which Germany raised the issue. German Foreign Minister Fischer first raised the possibility of a failure of consular notification with Secretary Albright on 22 February 1999, only two days before the scheduled execution of Karl LaGrand, leaving insufficient time for an investigation of the matter prior to the execution. Similarly, the Application and Request for Provisional Measures before this Court were filed the evening before the scheduled execution of Walter LaGrand. I ask the Court to consider that the untimely diplomatic contact concerning the failure of consular notification and the untimely filing of the Application in this Court are both directly attributable to the Government of Germany.

1.25. *Capital Punishment.* Although many here have grave reservations about capital punishment, this case is not, as the opinion of the Court[4] and the German Memorial agree[5], a case about capital punishment. International law permits capital punishment when it is duly prescribed for commission of the most serious crimes and carried out by a State in accordance with due process of the law and stringent procedural safeguards, as is the case in the United States. The International Covenant on Civil and Political Rights specifically recognizes this. Some 70 States currently retain and use the death penalty for the most serious crimes. The constituent states of the United States that have chosen to retain the option of capital punishment for the most serious crimes have done so by open and democratic means.

1.26. Most importantly, the Vienna Convention on Consular Relations makes no reference to capital punishment. No reference exists to capital punishment in its extensive preparatory work. No reference exists to capital punishment in the academic writing on the Convention prior to the case Paraguay brought in this Court in 1998. Nor do the provisions of the Convention make any distinction between cases of capital punishment and other criminal cases involving other sentences. Any interpretation of this Convention by this Court in this case, accordingly, should be equally applicable to non-capital cases as well. I have no doubt that the Court will recall that its jurisdiction is limited to the interpretation and application of the Vienna Convention on Consular Relations and does not extend to far-reaching initiatives to litigate the death penalty under the guise of a violation of this Convention.

1.27. Mr. President, Members of this Court, let me introduce the counsel for the United States and summarize briefly the remaining presentations today.

Order of presentation

1.28. Mr. President, I will ask you first to call upon the Honourable Janet Napolitano, the Attorney-General of the State of Arizona, its highest law enforcement official, who is elected by the people of Arizona. Attorney-General Napolitano will present the significant facts in this case and discuss the speculative and implausible character of the prejudice alleged by Germany.

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[4] Order of 3 March 1999, *LaGrand Case (Germany v. United States)*, para. 25.

[5] Memorial, paras. 1.08-1.09.

1.29. We will then ask the Court to hear from Theodor Meron, Charles L. Denison Professor of Law at New York University, currently serving as Counsellor on International Law at the Department of State. Professor Meron will address the competence of the Court in this case.

1.30. Following Professor Meron, we will ask the Court to hear from Ms Catherine Brown, Assistant Legal Adviser for Consular Affairs in the Department of State and Deputy Agent in this proceeding. Ms Brown will address the extensive efforts made by the United States to prevent recurrence of this breach and will analyse the consular notification provisions of the Vienna Convention.

1.31. We will then ask the Court to hear from Mr. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs in the Department of State and Deputy Agent in this case, who will address the relief sought by Germany.

1.32. Following Mr. Mathias, we will ask the Court to hear from Professor Stefan Trechsel of the University of Zurich and long-time member and former President of the European Commission on Human Rights. Professor Trechsel will discuss the nature of the right of the foreign national to be informed of his or her right to notification of a consular official. He will focus on three questions: first, can this right be considered as belonging to the category of human rights; second, regardless of how one defines the right to such consular information, is it a right of defence that is part of the right to a fair trial; and third, if it were such a right (which he will conclude that it is not), what consequences derive and do not derive from breaching this right.

1.33. Following Professor Trechsel, the Court shall hear from Professor Michael Matheson of the Johns Hopkins School of Advanced International Studies, who will address the Court's Order indicating provisional measures in this case and the US response to that Order.

1.34. I thank the Court for its attention. Mr. President, I ask you to call upon Attorney-General Napolitano.

The PRESIDENT: Thank you very much Mr. Thessin. I will now give the floor to the Honourable Janet Napolitano, Attorney-General of the State of Arizona.

Ms NAPOLITANO:

2.1. Mr. President, Members of the Court, it is an honour for me to appear before you today. I am mindful of the fact that it is unprecedented for the United States to invite an official of a state of the United States to assist in representing it before this Court. I deeply appreciate this opportunity, and hope that my comments today will help you in understanding the issues raised by this case.

2.2. I am here today in part because the State of Arizona bore direct responsibility for bringing the LaGrand brothers to justice for the crime of first degree murder and for carrying out the sentence imposed upon them. I am also here today because, while international law attributes to the United States international responsibility for a breach of Article 36 of the Vienna Convention, the breach in this case arose because officials in the State of Arizona did not inform the LaGrand brothers of the right of consular notification once it was known they were German nationals. Thus the US Department of State thought it appropriate, and I agreed, that I should undertake to explain to the Court the essential facts of this case. My plan is first to explain the facts relating to the breach of Article 36, then to review for the Court the criminal proceedings and to finally address the absence of prejudice.

2.3. Let me first, however, say a few words about the context in which this case arose. The Court is aware, that the United States has a federal form of government. A defining characteristic of our federalism that is not always well understood is that our federal government was constituted by individual states joining together and vesting powers — but only specified and limited powers — in the federal government. The states retained to themselves, and to the people, all other powers. One consequence of this is that a state such as Arizona has an autonomous criminal justice system in which the federal government has virtually no role. Thus the murder that the LaGrand brothers committed was prosecuted by Arizona authorities, without any federal government involvement. It was a crime against the people of Arizona, and the LaGrands were charged with murder under the laws of Arizona. The President of the United States, although the Chief Executive Officer of the United States, had no authority to bring the LaGrand brothers to trial for the murder, and had no authority over the administration of the sentence imposed upon them. Only the federal courts of the United States, as overseers of federal constitutional rights in the United States, had any authority to affect the outcome of the LaGrands' case.

2.4. Within the United States each state also has its own governmental structure, which can be quite different from that of another state. Arizona has 15 counties and a decentralized criminal justice system. In addition to the Arizona Attorney-General, who is a statewide elected official, there exists for each county, a county attorney who is elected by the people of that county. Each county attorney has primary prosecutorial jurisdiction in murder cases. The county attorney is responsible for bringing a defendant to trial and for the sentencing proceeding if the defendant is found guilty. It generally is only after an appeal is filed that my office becomes responsible for a murder case. Consistent with this arrangement, the LaGrands were prosecuted by the County Prosecutor of the Pima County Attorney's Office. My office handled the case on appeal, but the County Prosecutor again represented the State of Arizona in the final clemency hearing. The Governor of Arizona, as the Chief Executive Officer of the State of Arizona, had the responsibility to see to it that the sentences were faithfully carried out. She could commute the sentences through the pardon process, but only if she received a recommendation to do so from the Arizona Board of Executive Clemency.

2.5. It may also be helpful to the Court to know something about the geography and demography of Arizona. Arizona is slightly smaller than Poland, and has roughly the same population as Finland or Denmark. It is bordered on the south by Mexico. The LaGrands were arrested in Tucson, which is about an hour's drive north of Mexico. The site of the bank robbery and murder was a short distance further north and west. Los Angeles, California, where the German consular post responsible for Arizona is located, is about 488 miles from Tucson. Arizona has a very diverse population, including a large number of Hispanics, American Indians, African-Americans, and Asian-Americans as well as Caucasians. This diverse population results in part from our location in the American Southwest and our proximity to Mexico, and from the presence of several military bases in Arizona. Many United States servicemen have started families in other countries, and have been subsequently transferred into Arizona. Their wives or husbands or children are often foreign born, but their children in particular, normally are citizens of the United States. (It was therefore unusual that the LaGrands were not United States citizens, first, because they were born out of wedlock to United States citizen fathers, and second, because they were adopted by a United States citizen who failed to complete the necessary naturalization procedures.) Because of Arizona's diversity, our law enforcement personnel deal frequently with persons born abroad who are the American citizen children of United States servicemen. Because of concerns about discrimination and equal treatment under the law, and based on the experience of dealing with this diverse population, our law enforcement personnel have learned that they can easily offend American citizens such as these by questioning their nationality.

The facts relevant to the breach of Article 36 (1) *(b)* and to Germany's last-minute intervention in this case are not as Germany has represented them

2.6. With those preliminary remarks, I would like to turn now to the facts relating to the failure of notification in this case. After Germany instituted these proceedings, my office assisted the United States Department of State in investigating the consular notification issue. The results of that investigation are set forth in a lengthy report provided to you and provided to the German Government by the United States in February of this year — it is Exhibit 1 to the Counter-Memorial. Prior to that investigation, there was considerable confusion about the LaGrands' nationality and what was known about it between January 1982, when the LaGrands were arrested, and in June 1992, when the LaGrands established contact with German consular officials in Los Angeles.

2.7. Our investigation showed that the arresting officers thought that Karl and Walter LaGrand were US citizens based on Karl and Walter's representations. The arrest procedures of Pima County included completing an arrest sheet, which required information about the citizenship of the arrested person. The options on the sheet were to check a box indicating US citizenship or to fill in a blank line with the name of the arrestee's country of nationality if not a US citizen. This is Exhibit 1 to the German Memorial. This sheet is filled out with information provided by the arrested person. The arrest sheet for Karl shows clearly — but erroneously — that he was a US citizen. The arrest sheet for Walter does not have the box for US citizen checked, but neither was the line for nationality if not a US citizen filled out. From this, the report concluded that neither brother identified himself as a German national to the arresting officials, and that Karl affirmatively said he was a US citizen. Moreover, at the time of the crime, both brothers wore their hair in an African-American style and spoke without a hint of a German accent[6]. They looked like Americans, they talked like Americans, their entire demeanour was American.

2.8. We also learned that at least some of the arresting officials knew that the LaGrands' fathers were US servicemen, which simply reinforced their understanding that the LaGrands were US citizens, even though they knew that the brothers had been born in Germany. They would have made this assumption in part based on their experience with the US military population in Arizona. I have since learned that this was a very common misunderstanding about US citizenship law, and that even the US citizen parents of adopted foreign-born children mistakenly think that their adopted children automatically become citizens. In fact, after the brothers were adopted by Masie LaGrand, he apparently thought that his adopted sons were American citizens, because he clearly identified both Walter and Karl as US citizens to the United States Army when he arranged for their travel to Germany in 1974. This is strong evidence that the LaGrands themselves thought that they were or might be US citizens at the time of their arrest. They certainly did nothing to suggest to the arresting officers that a further enquiry into nationality was warranted.

2.9. Our investigation also showed that the LaGrands were initially detained in the Pima County jail, and that those jail officials also apparently thought that the LaGrands were Americans. This is understandable, since they would have had the same information as the arresting officials.

2.10. Our investigation further disclosed, however, that after the LaGrands were transferred from the county jail to an Arizona state prison, state prison officials apparently learned that they were not in fact Americans. We could not determine exactly what they knew, how they knew it, or when they knew it, given the lapse of time. But an official of the state prison wrote to the US Immigration and Naturalization Service in mid-1983 advising the Service that it was possible that the LaGrands were illegal aliens. By late 1984, the prison's records clearly showed that the LaGrands were German. So, the report inferred that the Immigration Service confirmed to the prison that the LaGrands were German. Clearly, the LaGrands should have been asked whether they wanted a German consular official notified of their detention once that information was confirmed. Arizona regrets that proper information was not given to the LaGrands at that time.

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[6] Exhibit 1 to the United States Counter-Memorial submitted to this Court on 27 March 2000, p. 3.

2.11. Thus far I have focused on the arresting and detaining authorities because in the United States they have been considered to be the competent authorities for purposes of Article 36. It is important to know, however, that other people who were not regarded as competent authorities knew, or had access to information showing, that the LaGrands were in fact German nationals.

2.12. After the LaGrands were convicted, the court's sentencing process provided for preparation of what we call a "presentence report". A presentence report is prepared by a court employee after conviction has occurred to assist the court in sentencing. It contains social history and other information relevant to sentencing, as well as information about the crime. I refer the Court to Exhibit 6 to the United States Counter-Memorial, as well as to Annex 2 of the German Memorial. The court employees responsible for drafting the LaGrands' presentence report knew that the LaGrands were German and reflected that information in the report. Those employees, however, had no responsibility for the arrest or detention of the LaGrands and were not acting as lawyers or as sworn peace officers charged with the detention of prisoners. The United States has never considered such officials to be competent authorities responsible for consular notification under the Vienna Convention. Moreover, the arresting and detaining authorities would not have been given the presentence report, and thus would not have known that the presentence report — unlike the arrest sheet — identified the LaGrands as German nationals.

2.13. Importantly, given Germany's protestations that somehow the presentence reports were unavailable, the presentence reports about Karl and Walter were provided not only to the judge, but also to the prosecutor and to the LaGrands' defence counsel. You can see that the defence lawyers had it by looking at Annex MG 5 to the German Memorial, which shows that, during the sentencing hearing held on 12 December 1984, the judge specifically asked the attorneys if they had received copies, and both attorneys replied in the affirmative[7]. Thus it is clear that the prosecutor and the two defence lawyers at least had access to information that the LaGrands were German.

2.14. Walter's own defence lawyer confirmed to us that he knew that Walter was a German national. In contrast, Karl's attorney assumed, as had the Arizona officials who arrested the

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[7] Ann. MG 5, p. 419.

LaGrands, that the LaGrands were American citizens. Karl's defence lawyer knew that Karl had been born in Germany, but also knew the LaGrands' fathers were American servicemen and was himself a US military dependant. In any event, both defence lawyers knew that the brothers had lived in Germany for a few early years.

2.15. I understand that Germany contends that it was misled about when Arizona officials knew that the LaGrands were German. It has alleged that it learned only at the clemency hearing for Karl LaGrand on 23 February 1999, that the LaGrands' German nationality was known to Arizona from the beginning. While the LaGrands themselves bear some responsibility for causing confusion, the fact is that their nationality was known to the state and to the defence counsel and to the judge prior to sentencing. Germany has confused the question of when Arizona arresting and detaining authorities knew with the question when the LaGrands' lawyers and the prosecutor knew.

2.16. Germany tried to emphasize that it only learned of the extent of the alleged breach at the clemency hearing when the prosecutor for the Pima County Attorney's Office, the office that originally charged and prosecuted the LaGrands, said that it was well known before the LaGrands were tried that they were German. If the Court listens carefully to the context of the prosecutor's remarks, the Court will see that he was responding to assertions made at the hearing that, if consular notification had occurred, German consular officials could have obtained mitigation evidence from Germany that could have resulted in the LaGrands receiving a sentence of life imprisonment. The prosecutor's point was that the LaGrands' own defence counsel were fully aware that the LaGrands had been born and lived the first few years of their lives in Germany. The LaGrands' own defence counsel could have sought mitigation evidence from Germany regardless of any consular assistance. Arizona's failure to inform the LaGrands that they could request consular assistance thus in no way precluded their obtaining evidence from Germany to present as part of their defence, as indeed they did.

2.17. The availability of the presentence report to the defence lawyers also demonstrates that the LaGrands could have raised the breach of Article 36 as a defence in the LaGrands' criminal proceedings, if they had thought this was an important legal issue. More importantly, however, it shows that there is no justification for Germany's own delay in raising the consular notification issue since it admits, as it must, that it also knew of the LaGrands' situation by 1992, seven years before it instituted these proceedings. If it had been seriously interested in understanding what information was considered in sentencing the LaGrands, Germany could have received the presentence reports at any time after 1992 simply by asking the LaGrands' lawyers for them, or asking the State of Arizona or asking the United States Department of State. Germany's reference yesterday that the presentence report was under seal is misleading. The Court can see from page 1009 of the German Memorial that the presentence reports had become public at least by March 1993, when Karl LaGrand filed them in the federal district court as part of his effort to have his conviction and sentence overturned[8]. If Germany had been reasonably diligent, it would not have been surprised by the remarks at the clemency hearing by the County Prosecutor, who was absolutely correct in advising that the failure to inform the LaGrands about the possibility of consular notification was in no way an obstacle to their presenting evidence from Germany at their mitigation hearing. Any implication that Germany could not have had access to the presentence report prior to the date of the clemency hearing is simply wrong.

2.18. I would also like to assure the Court that considerable steps have been taken by Arizona since 1992 regarding consular notification. Even before this case came to the forefront, the Governor of Arizona and my predecessor in office had taken numerous steps to ensure that all competent officials in Arizona understand and comply with the consular obligations of the United States. In doing so, we have worked closely with the United States Department of State to ensure that our guidance is consistent with the requirements of both the Vienna Convention and the many bilateral treaties to which the United States is a party.

2.19. All Arizona county attorneys, who are responsible for prosecutions, have been reminded in writing of these requirements as have all heads of the various police agencies in Arizona. Local police departments, which are responsible for arrests, have adopted orders on consular notification. The Arizona Department of Corrections, which is responsible for post-conviction detentions and some pretrial detentions, now has guidance on consular notification and has compiled and distributed to all corrections facilities a list of consular offices in the United States in or nearest to Arizona. This of course includes the German consulate in Los Angeles,

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[8] Ann. MG 46.

California, which serves Arizona. Our Department of Corrections has adopted procedures that require that the citizenship of all detained inmates be determined and that information about consular assistance be given to all foreign-born inmates, even though some may be United States citizens. My predecessor in office wrote to the Chief Justice of the Arizona Supreme Court to seek a change in the rules of the courts of Arizona that will also help ensure compliance. We have conducted and will conduct numerous training sessions, which are supplemented by training sessions conducted by the United States Department of State officials in various Arizona locations and by wide distribution within Arizona of the Department of State's written guidance on consular notification. I can state unequivocally that the State of Arizona is fully committed to this effort and has been since long before the present case was filed.

The LaGrands received all of the due process protections necessary to ensure that they received a fair trial

2.20. I would now like to turn to the actual criminal proceedings and to Germany's two claims related to those proceedings. The first is that, because the LaGrands were not informed that they could request consular notification, there should have been a subsequent opportunity to alter the outcome of their criminal proceedings. The second is the claim that, if the LaGrands had been informed of their right to consular notification on a timely basis, the outcome of the proceedings would in fact have been different. I submit to the Court that neither of these propositions is correct.

2.21. The LaGrands were tried, as I have said, by the State of Arizona under the laws of Arizona. The LaGrands were afforded the full set of procedural and substantive safeguards pertaining to criminal trials regarding capital punishment in the State of Arizona. These include the protections of what Americans call the "Bill of Rights", which consists of the first ten Amendments to the Constitution of the United States and which in the criminal context establish rights afforded to all individuals in the United States, whether they are citizens or not. The time available to me today is insufficient to review all of the safeguards that applied, but I would like to review those that were especially relevant to the trial of Walter and Karl LaGrand.

2.22. First, the LaGrands were guaranteed the right to be tried before a fair and impartial tribunal under the Fifth and Fourteenth Amendments to the United States Constitution[9]. There is no dispute in this case that both the jury and the judge were fair and impartial.

2.23. Second, under Arizona and federal law, the LaGrands were guaranteed that they would not be discriminated against because of their race, ethnicity, gender, or national origin[10]. There is no evidence and no allegation whatsoever that the LaGrands were discriminated against. They certainly were not discriminated against because they were German nationals.

2.24. Third, the LaGrands were entitled under the Fifth Amendment to the United States Constitution to remain silent and not to give any statement to police or other officials. These rights were fully respected[11].

2.25. Fourth, under the Sixth Amendment to the United States Constitution, the LaGrands were also entitled to be informed of the charges against them; to have a public trial by a jury; and to have adequate time and opportunity to prepare their defence and to consult with legal counsel[12]. Again all of these rights were accorded the LaGrands.

2.26. The Sixth Amendment also guarantees the right to counsel. Yesterday, Germany emphasized that, if the LaGrands had received notice of right to consular notification, Germany would have assisted them in obtaining better counsel, and this could have changed the result. This contention does not withstand analysis. The question whether the LaGrands' lawyers provided adequate representation was one that the LaGrands were entitled to raise in the course of appealing their convictions. Walter chose not to raise the claim in his initial appeals, although Karl did. The courts of Arizona and of the United States both concluded that the LaGrands' right to effective legal representation had not been violated[13]. Germany has somewhat grudgingly conceded this in Walter's case, and has apparently accepted that Walter's attorney could not be faulted. Germany has, however, disparaged the work of Karl's attorney. The Arizona Supreme Court thoroughly reviewed all aspects of Karl's ineffective assistance of counsel claim and correctly rejected it. The Supreme Court was mindful that Karl was tried together with Walter and Walter's attorney conducted thorough and aggressive cross-examination of the witnesses. The Court found that the decision not to pursue an insanity defence was reasonable given that it would have opened Karl's juvenile court record to scrutiny. Karl's counsel argued impulsivity, the only other suggested defence, in his closing remarks and during sentencing. Thus, the Court could not identify any prejudice to Karl by virtue of his counsel's decisions[14].

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[9] *Delaware* v. *Van Arsdall*, 475 US 673 (1986).

[10] *Craig* v. *Boren*, 429 US 190 (1976); *Loving* v. *Virginia*, 388 US 1 (1967); *Bolling* v. *Sharpe*, and 347 US 497 (1954); *Korematsu* v. *United States*, 323 US 214 (1944); *Yick Wo* v. *Hopkins*, 118 US 356 (1886).

[11] *Tague* v. *Louisiana*, 444 US 469 (1980); *North Carolina* v. *Butler*, 441 US 369 (1979); *Miranda* v. *Arizona*, 384 US 436 (1966); *US* v. *Garibay*, 143 F.3d 534 (9th Cir. 1998).

[12] *County of Riverside* v. *McLaughlin*, 500 US 44 (1991); *Jones* v. *Barnes*, 463 US 745 (1983); *Duncan* v. *Louisiana*, 391 US 145 (1968); *Gideon* v. *Wainwright*, 372 US 335 (1963); *Glasser* v. *United States*, 315 US 60 (1942).

[13] Ann. MG 4 and MG 10.

2.27. Accordingly, Germany is on very thin ground here. It insists that it is not seeking to make this Court a court of criminal appeal, yet, clearly, it would have this Court believe that Karl LaGrand's defence lawyer was somehow incompetent and that a different lawyer might have achieved a different result. Only hindsight and wishful thinking sustain Germany's assertion that inadequate counsel led to Karl being sentenced to death. The clearest proof of this, of course, is that Walter also was sentenced to death notwithstanding the efforts of his lawyer, whom Germany has not criticized in a similar way.

2.28. Returning to the rights accorded to the LaGrands as criminal defendants, they had a right to the assistance of investigators and experts, if they could show a particularized need for such assistance[15]. In addition, if the LaGrands had not understood English, they would have been entitled to be assisted by an interpreter[16]. No interpreter was needed, however. As the Court can hear for itself on the videotapes, the LaGrands spoke perfect English.

2.29. Finally, because the prosecutor sought the death penalty, the LaGrands were entitled to additional protections designed to guard against the possibility that capital punishment might be imposed capriciously, arbitrarily, or disproportionately. For example, automatic appellate review of the conviction as well as the sentence was required[17]. Consistent with this requirement, the

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[14] Ann. MG 4, pp. 306, 307.

[15] *Ake* v. *Oklahoma*, 470 US 68 (1985); *State* v. *Dickens*, 926 P.2d 468 (1996); A.R.S., paras. 13-4013 *(a)*.

[16] *State* v. *Hansen*, 705 P.2d 466 (Ct. App. 1985).

[17] *State* v. *Brewer*, 826 P.2d 783 (1992).

LaGrands' convictions and sentences were reviewed on appeal by the Arizona Supreme Court, which was one of only many courts that reviewed the fairness of the trial.

2.30. The LaGrands also were entitled to seek executive clemency, including commutation of their sentences[18]. The LaGrands exercised this right, and Germany has provided the Court with copies of the official videotapes made of the clemency proceedings. Those tapes show an intense review of all of the factors that led to the original sentence: the gravity of the crime, the devastating impact it had on the surviving victim, the LaGrands' difficult childhood, and their remorse. Ultimately, the clemency board decided that a sentencing judge's balancing of these factors should be left undisturbed, and that the sentences should not be commuted.

2.31. If any of the fundamental rights I have enumerated — or if any other fundamental rights guaranteed to the LaGrands — had been violated, the judicial remedies available to the LaGrands could have led to a new trial or sentencing hearing. In fact, numerous courts reviewed their convictions and sentences at their behest over a 15-year period and concluded that the convictions and sentences should not be disturbed. The LaGrands first had an appeal as of right to the Arizona Supreme Court, which is made up of five justices, all of whom come from different backgrounds. The opinions that resulted from that appeal are before this Court as exhibits to Germany's Memorial[19]. The opinions show that the brothers raised many issues. The State Supreme Court independently examined, for example, the admissibility of the statements made by Karl. It examined the instructions given to the jury, it examined whether it was appropriate to excuse from the jury someone opposed to capital punishment. It examined whether imposition of capital punishment was consistent with applicable legal requirements. It examined whether Karl had adequate legal counsel: and it examined a number of other technical issues.

2.32. The Arizona Supreme Court on direct appeal did not examine whether the failure to inform the LaGrands that they could request consular assistance was relevant to the trial, because neither brother raised the issue. The Supreme Court examined all the mitigating evidence Germany insists was omitted, including the LaGrands' difficult upbringing. In fact, the Arizona Supreme Court decision specifically found that the trial court judge also considered mitigating evidence, as pointed out in the opinion where the court states and I quote: "[t]he trial judge found three mitigating factors: defendants' ages (Walter was 19 and Karl was 18 at the time of the killing), their prior home lives, and their remorse"[20]. The Supreme Court noted that the trial judge did not find these mitigating factors sufficient to outweigh the aggravating circumstances. The Supreme Court then went on to also independently find that the mitigating factors were not sufficient to warrant leniency. The court stated: "In addition to noting defendants' relatively young ages, we have reviewed histories of their upbringing . . ."[21] Thus the very evidence that Germany claims it would have provided to the Court, was in fact actually presented to the court. The Supreme Court nonetheless concluded, "these mitigating factors do not outweigh the existing aggravating circumstances and thus do not warrant leniency"[22]. The aggravating circumstances to which the court referred were the especially cruel, heinous and depraved nature of the LaGrands' conduct, the fact that the brothers had a prior felony conviction involving a violent offence, and that the murder was committed for pecuniary gain. Remember, this was a bank robbery during which the LaGrands stabbed a 63-year old bank manager 24 times with a letter opener until he died. They also stabbed a bank teller multiple times, though she lived to testify against them. No additional evidence that Germany would have provided would have changed these facts or the nature of the mitigation that the court considered.

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[18] *Gregg* v. *Georgia*, 428 US 153 (1976); *State* v. *Richmond*, 560 P.2d 41 (1976).

[19] Anns. MG 3 and MG 4, both 30 Jan. 1987.

2.33. The LaGrands asked the United States Supreme Court to review the Arizona Supreme Court's decision. This was a discretionary appeal, and the Supreme Court declined to take the case[23]. Such a decision by our United States Supreme Court generally indicates that it has concluded, based on the defendants' request for review, that no substantial federal issue warranting its review was presented.

2.34. Having thus exhausted their direct appeals, the LaGrands were entitled to seek post-appellate relief by collaterally attacking the validity of their convictions and sentences in both the state and the federal courts. They first initiated such proceedings in the state courts. In 1989 the Arizona lower court denied post-conviction relief, and in 1990, the Arizona Supreme Court affirmed that decision. In June 1991, the United States Supreme Court again declined to review those decisions. In this proceeding, which was the first request for collateral review in the Arizona state courts, the LaGrands raised a number of issues, but they again did not raise the issue of consular notification.

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[20] Ann. MG 3, pp. 293, 299, 300.

[21] Ann. MG 3, pp. 293, 301.

[22] Ann. MG 3, pp. 293, 301.

[23] Ann. MG 7, 5 Oct. 1987.

2.35. The LaGrands next exercised their right to seek *habeas corpus* review of the legality of their detention by the federal courts. This process allows them to raise directly in a federal trial court any claims they had of violations of the United States Constitution or other provisions of federal law. They began this process in March 1993 by seeking review in the United States District Court for the District of Arizona[24]. It was in the District Court that the LaGrands, for the first time, sought to raise a claim relating to the failure of consular notification. That court issued two decisions on different aspects of the state court proceedings[25]; the 24 January opinion deals with the consular notification issue. The court noted that the issue could be raised only if the LaGrands could show cause for the default and prejudice. Otherwise, review was precluded by the failure of the LaGrands to raise the issue in the prior state court proceedings.

2.36. Germany has been critical of the procedural default rule. This is a federal rule that, before a state criminal defendant can obtain relief in federal court, the claim must be presented to a state court. If a state defendant attempts to raise a new issue in a federal *habeas corpus* proceeding, the defendant can only do so by showing cause and prejudice. Cause is an external impediment that prevents a defendant from raising a claim and prejudice must be obvious on its face. One important purpose of this rule is to ensure that the state courts have an opportunity to address issues going to the validity of state convictions before the federal courts intervene.

2.37. The federal court found that the LaGrands had failed to meet this requirement of showing an objective external factor that prevented them from raising the issue earlier, and therefore it was not necessary to reach the question of prejudice[26]. While the court did not discuss this issue at length, I would offer the observation that defence counsel are generally expected to know the rights that are relevant to the defence of their clients. I would also note that nothing impeded the LaGrands' defence lawyers from seeking assistance from the German Government, or other sources in Germany, if they had thought that doing so would be useful, or from exploring whether there was any obligation to inform Germany of the arrests.

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[24] Ann. MG 46.

[25] Anns. MG 8 and 9, 24 Jan. 1995 and 16 Feb. 1995.

[26] Ann. MG 8, pp. 456 and 458.

2.38. The decisions of the United States District Court were reviewed by the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit consolidated the appeals and issued its decision on 16 January 1998[27]. It found no merit to the LaGrands' claims. It looked closely at the question whether the LaGrands should be permitted at this late stage to raise the consular notification issue. The court noted that the claim was procedurally defaulted for lack of a showing of cause and prejudice. Nevertheless, the court stated that, "[l]acking cause and prejudice, we may nonetheless consider procedurally barred claims if failure to do so would result in the conviction or execution of one who is actually innocent"[28]. I invite this Court to read the Ninth Circuit's discussion of this issue, which is on page 483 of Volume II of Germany's Memorial.

2.39. As the Ninth Circuit's opinion indicates, the procedural default rule is not so rigid or so absolute that it would allow for a miscarriage of justice. As is so often the case, to reach its conclusion, the court looked at the underlying arguments that the LaGrands were presenting. One could say that the court peeked behind the veil and decided that there was not enough behind the veil to warrant opening it all the way. It is clear from the Ninth Circuit's discussion that the court was aware that the LaGrands came from a mixed marriage and a troubled childhood. The court held, however, that even given that mitigation evidence, the crime the LaGrands committed and the way they committed it made them eligible for the death penalty. Thus there was no miscarriage of justice. The United States Supreme Court again declined to review this decision in December 1998[29].

2.40. Thus the United States Supreme Court's December 1998 decision was the final step in three separate proceedings that provided the LaGrands a full and fair opportunity to challenge their convictions and sentences. The first, of course, was the direct appeal from the state trial court to the state Supreme Court and then to the US Supreme Court. The second was the collateral review of the state conviction by the Arizona state courts, and the third was the collateral review of the state conviction by the federal courts. Thus, over the course of 15 years, this matter went through these three separate intense reviews and the case was decided against the LaGrands in all three proceedings.

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[27] Ann. MG 10.

[28] Ann. MG 10, p. 483.

[29] Ann. MG 11.

2.41. When all is said and done, the LaGrands' case was reviewed by a total of 15 different independent judges or justices on four different courts beyond the state trial court. When that process was completed, however, the State of Arizona still could not implement the sentence until specifically authorized by the Arizona Supreme Court. On 15 January 1999, the Supreme Court of Arizona issued warrants for carrying out the sentence of death originally imposed on Walter and Karl LaGrand in December 1984. It set Karl's execution for 24 February 1999 and Walter's for 3 March 1999. The warrant for Walter's execution is before the court as Annex MG 13. The warrants allow Arizona to set the time for the executions. In each case, if the execution had not occurred within 24 hours of the time set, the warrants would have expired, and a considerable period of time would have elapsed before a new date could be obtained from the Arizona Supreme Court.

2.42. The issuance of the warrant precipitated a number of events. At the political level, in early February, German government officials appealed to President Clinton, to Secretary of State Albright, and to the Governor of Arizona, asking to have the death sentences commuted to life imprisonment on humanitarian grounds. At that time, the German Government did not ask that the sentences be commuted because of consular notification issues. In fact, the letters made clear that Germany agreed that the LaGrands had received a fair trial. The LaGrands also returned again to the Arizona state courts, on 2 February 1999, and to the federal courts for relief. In the state court they sought to raise a number of issues, including the notification claim.

2.43. On the legal front, one of the aspects of our judicial system, which is criticized by some and praised by others, is that even after the 15 years of extensive appeals that I have described it was still possible for the LaGrands to seek a last-minute relief from the state and federal courts, and they did so. In a decision issued 23 February 1999, the state court ruled in Karl's case that the consular notification claim was procedurally defaulted[30]. The federal appeals court issued another decision on 24 February, in which it also said that the consular notification claim was defaulted[31]. Various issues were then raised with the US Supreme Court, which finally permitted Karl LaGrand's execution to occur that evening[32].

2.44. A similar sequence of events occurred at the last minute in Walter's case. In addition, on the very day scheduled for Walter's execution — 3 March — Germany attempted to file suit against the United States in the United States Supreme Court to block the execution, based on the Provisional Measures Order of this Court. Such a suit is one of a very limited number of kinds of cases that can be filed originally in the Supreme Court without first having been filed in the lower courts. They are extraordinarily rare, and the Court does not accept them readily in part because its primary function is to review questions of law, not to make findings of fact which may require time-consuming fact-finding proceedings. For reasons explained by the Supreme Court in the opinion before you as Annex MG 32, the Court declined to permit the suit to be filed given its last-minute nature. None of the state or federal courts that considered the LaGrands' claims in February and March 1999 found a legal basis to stay the executions.

2.45. Independent of any legal bar, the LaGrands also had the opportunity to seek the stay of their execution or commutation of their sentence through the clemency process established by the State of Arizona. As I have previously noted, the Court can observe that process by watching the videotapes submitted by Germany. On 23 February 1999, the Arizona Board of Executive Clemency met to consider a commutation of sentence for Karl LaGrand. On that same day, at the conclusion of the hearing, and by a majority vote, the Board did not recommend a commutation for Karl LaGrand. This meant that the Governor of Arizona had no option to grant clemency.

2.46. On 2 March 1990, the Arizona Board of Executive Clemency met to consider the case of Walter LaGrand. The Board again recommended against a commutation of sentence. Towards the end of the clemency hearing, however, word of Germany's Application and Request for Provisional Measures reached the Board. In these rushed circumstances, it recommended to the

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[30] Ann. MG 24.

[31] Ann. MG 21.

[32] Ann. MG 23.

Governor a 60-day reprieve. Notwithstanding this recommendation, the Governor decided that the execution should go forward. Her statement about her decision is before you as Annex MG 33. The Court will note that the Governor's statement is dated 2 March, although Walter's execution was set for and occurred on 3 March. This is because the Board recommendation was made on 2 March and, in the interest of justice and to bring certainty to both the victims and to the defendant, she issued her decision in a timely fashion rather than wait until the last minute.

2.47. The decision whether to grant a reprieve or clemency is a very personal one, and I would not purport to describe the Governor's thinking on this issue beyond referring to her statement. I would note, however, that the Board's failure to recommend clemency indicated that it believed that the sentence should not be disturbed. In addition, the people of Arizona had given the LaGrand brothers a fair trial, three separate appellate processes, and an enormous amount of due process. During that time, the victims of their brutal murder had waited patiently. The Governor knew that the victims and the prosecutor continued to support the sentence of capital punishment, and she was required by law to consider the victims' views[33]. She had no reason to think that the failure to inform the LaGrand brothers that they could request consular assistance was in any way relevant to the outcome of these long proceedings. She knew that the LaGrands had presented evidence of their troubled childhoods, including their brief years in Germany, to the original sentencing judge. She knew that the LaGrands had been given all of the rights that an American citizen would have been given. And she was aware of the United States Department of State's interpretation of the Provisional Measures Order, which Professor Matheson will address later. It is fair to say, then, understanding that there was no legal impediment to the execution and that the Clemency Board had recommended against commutation, she concluded that the equities weighed in favour of proceeding.

Germany's claim that the outcome would have been different if the LaGrands had been informed of the right to have German consular officials notified of their detention is speculative and demonstrably unfounded

2.48. I would like now to turn in more detail to Germany's claim that, if the LaGrands had been informed in 1982, 1983, or 1984 that they could have German consular officials notified of their arrest and detention, the outcome of their sentencing proceeding would have been different. I respectfully submit that, in fact, the outcome would have been the same, for any number of reasons.

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[33] Arizona Revised Statutes, paras. 13-4401 *et seq.*

2.49. First, it is clear that the LaGrands were not strangers in Arizona unfamiliar with the language or culture of their surroundings or with the Arizona legal system. They were well-established in Arizona and in the United States. Their family ties were all in the United States. Their mother, their sister (who testified on their behalf), their girlfriends, and their friends, were all in the United States. They understood the American system of justice. They spoke English with the fluency of native-born Americans. They looked like Americans. Their demeanour was American. It is inconceivable that they were disadvantaged in any way as they went through the criminal justice process by the fact that they were German nationals. Indeed, as I have already noted, one of the brothers even identified himself as a United States citizen at the time of his arrest, and neither identified himself as German although given the opportunity to do so. It appears that the LaGrands themselves thought that they might have acquired United States citizenship as a result of having been adopted by a United States serviceman.

2.50. Second, there is every reason to think that the LaGrands would not have requested consular notification if they had been informed that they could do so. By 1982, the LaGrands had had virtually no contact with the German Government for 15 years. They had never been documented as German nationals after being included in their mother's German passport in 1967. They had made one trip back to Germany after 1967, for about six months, but that was done on US military travel orders, and they lived in United States military housing while there. All indications are that they lived in Germany as Americans and did not even retain an ability to speak German. Contrary to the suggestion made yesterday that both LaGrands availed themselves of consular assistance, Walter LaGrand refused consular visits from a German consular officer on at least two occasions.

2.51. Finally, even if the LaGrands had requested consular assistance prior to their sentencing hearing, Germany has not shown that it would have provided any significant assistance that would have affected the outcome. When German consular officials learned in 1992, that the LaGrands were imprisoned in Arizona, they themselves were uncertain whether the LaGrands were German or American and apparently refrained from providing consular services until the LaGrands'

German nationality could be confirmed. It is interesting to note that, like the officials of the Arizona state prison, the German Government wrote to the US Immigration and Naturalization Service to confirm whether the LaGrands were American or German. Even after the German Government was approached by Karl LaGrand's attorney, the German Government did not understand the legal significance of their German nationality. In a letter dated 17 March 1993, which we submitted to this Court this morning as part of our supplemental submissions, the German Government stated that it "would be interested in knowing . . . why their German citizenship is crucial to your defence". This letter is Tab 5 of the Supplemental Submissions. The process of confirming the LaGrands' nationality took the German officials six months. It is, therefore, highly probable that the process of confirming the LaGrands' nationality would not have been completed in time for any consular assistance to have been provided prior to sentencing.

2.52. In an attempt to show the level of consular services provided to its nationals who were arrested abroad, Germany filed with this Court Germany's Consular Instructions from 1975. Nowhere do these instructions state that Germany will take any significant steps on behalf of a defendant who is already represented by counsel, as the LaGrands were. At best, the instructions indicate that Germany might have loaned money to the LaGrands for purposes of their defence, but even this is not clear. Moreover, a piece of paper containing written instructions does not constitute evidence that those instructions were followed or how they were followed by the Los Angeles Consulate General in 1982, 1983 or1984.

2.53. In a further attempt to show their level of consular services, Germany has called the Court's attention to the case of two other German brothers who are on death row in Arizona. The Apelt brothers were arrested in January 1989, and by March 1989, German officials had made contact with the Apelt brothers, well before their trial, which occurred one year later. German consular officials had an opportunity to assist the Apelts prior to their trial. Yesterday, Germany suggested that it would have hired better lawyers for the LaGrands had it known earlier of their situation. In contrast to this speculative hindsight, Germany, when given the opportunity, did nothing and allowed the Apelts to be defended by lawyers provided by the state of Arizona. One of those lawyers has provided a declaration which is before the Court as Tab 6 of the Supplemental Submissions. He advised us that German consular officials did not assist the defence lawyers in preparation of the Apelts' defence. Rather, the consular officials asked only to be kept informed of the course of the proceedings. These facts, too, refute Germany's claim. If minimal services were provided to two German nationals facing capital punishment in 1989, there is even less reason to think that significant assistance would have been provided in 1982 to 1984; and the imposition of capital punishment in the Apelt cases further undermines Germany's suggestion that consular notification would have changed the outcome in the earlier LaGrand cases.

2.54. It is fanciful to think that the evidence of an unhappy childhood in Germany, that Germany has claimed would have resulted in the LaGrands' receiving a life sentence, would have had any effect. That evidence relates to just the first three to five years of the LaGrands' lives. It is true that the evidence shows that those years were troubled. It is also true that under the laws of Arizona evidence of a troubled childhood is the kind of evidence that can be offered as mitigation in a criminal proceeding. In this case, however, there was also ample evidence available to the defence that the LaGrands had lived equally, if not more, troubled lives in the United States. They had, in fact, lived the majority of their lives in the United States by the time of their trial, and it is unlikely that any defence lawyer would have considered it necessary to reach back to their brief lives in Germany to find more evidence of a troubled childhood than was already available.

2.55. This is particularly true because the available evidence included substantially the same kind of evidence about the LaGrands' childhood in Germany as Germany has proffered. At the sentencing hearing, psychologists who testified for the LaGrands noted that their childhood was difficult even in Germany, where they came from an interracial marriage and had been placed in a foster home. One of the psychiatrists who testified at the Aggravation-Mitigation hearing specifically told the trial court:

> "Germany isn't exactly like France or Italy or Spain. They're colour conscious, and they — they don't look very kindly at interracial marriages, and this affects the marriage and affects the children, interpersonal relationships of the children with the German kids in Germany and would affect adversely on the LaGrand children."[34]

The presentence report notes that the LaGrands' actions "may have partially resulted from a poor home environment, lack of family stability, broken home, poverty, and/or lack of education"[35]. An additional portion of the presentence report submitted by the United States also states clearly that the LaGrands had been placed in a convent in Germany by their mother because their mother could not care for them[36]. In sentencing the LaGrands, the trial judge took this into account. Every appellate court that discussed this issue noted that information about the LaGrands' troubled childhood, including the facts that they were in foster care in Germany and potentially discriminated against in Germany because they were multiracial, was available at the time of their trial and their sentencing. Thus, the evidence proffered by Germany is, at best, cumulative to that which was available in the United States and to the information that was in fact known to the sentencing judge.

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[34] Ann. MG 5, p. 355.

[35] Ann. MG 1.

2.56. Moreover, that evidence would simply have been weighed, as I have stated, along with other mitigating evidence, against the evidence offered by the County Prosecutor in support of its request for capital punishment. I do not wish to burden this Court again with a detailed account of the circumstances of the murder committed by the LaGrand brothers. You will find that evidence recounted in the court opinions before you. You may also obtain a flavour of the evidence offered at trial by watching the videotapes of the clemency hearing that Germany has submitted to this Court. Those tapes show that a critical witness against the LaGrands was a young woman who, at the age of 20, had seen her 63 year-old colleague brutally murdered and who had almost been murdered herself. Even in 1999 — 17 years later — this woman's terror and distress were palpable. Given the horrific circumstances of the crime the LaGrands had committed, and the eyewitness testimony of this young woman, the decision to impose capital punishment would not have been changed by the kind of mitigation evidence that Germany has proffered.

2.57. Before closing, I would like, as a prosecutor, to make a few general observations. Although I am not an expert in international law, I do bear responsibility for enforcement of the criminal laws enacted by a freely-elected legislature in a representative democracy. As we consider the issues of this case, which is not about capital punishment, but about the relationship between the criminal justice system of a country and the obligation of consular notification, it is important to remember that a horrible murder was committed simply because two men were frustrated when they tried to rob a bank, and to remember the stake society has in protecting itself from violent crime and in making sure that perpetrators of violent crime are brought to justice. Whether or not the LaGrands were told they could contact German consular officials bears no necessary relationship to the fundamental questions of whether they had adequate assistance of counsel, understood the proceedings against them, and received a fair trial. With hindsight, it is always possible to think of something more that might have been done. But in this case, there should be no doubt that the LaGrands received a fair trial with all appropriate procedural and substantive protection, and that they received all of the protection that an American citizen would have received. It is fanciful to think that the outcome of the proceedings would have been different if the LaGrands had been informed promptly that they could have German consular officials notified of their detention. Certainly this Court should find no reason to conclude that the United States is deficient in applying a rule of procedural default to a claim raised so long after the trial and so remote from the question of guilt or sentencing.

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[36] Exhibit 6 to United States Counter-Memorial.

2.58. Mr. President, Members of the Court, this concludes my presentation. I thank you for this opportunity to address you here today. I hope that I have been of some guidance in understanding the facts surrounding this case. I now invite you to hear from Professor Meron.

Le PRESIDENT : Je vous remercie. May I ask Professor Meron if he wishes to take the floor now, or if you prefer your exposé to be cut into two parts.

Mr. MERON: Mr. President, I shall be delighted to take a break right now.

The PRESIDENT: I shall defer to your wish.

The Court adjourned from 11.30 a.m. to 11.45 a.m.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise, and I now give the floor to Professor Theodor Meron.

Mr. MERON: Mr. President, distinguished Court,

3.1. I have the pleasure and the honour to address the Court this morning. My task is to discuss the jurisdiction of the Court which, as the Application instituting these proceedings itself clearly states, rests exclusively on the Optional Protocol to the Consular Convention. This jurisdiction is limited to disputes arising out of the interpretation or application of this Convention and nothing else.

3.2. May I start on a personal note. For me, this case is about a breach of State-to-State obligations and has nothing to do with human rights or with due process. It is for these reasons that, as a human rights scholar, I feel comfortable — perfectly comfortable — in arguing this case this morning for my government.

3.3. Allow me first to describe how I shall proceed. I will discuss the nature of the dispute and the obligation of Germany to demonstrate that its claims and submissions involve the interpretation or application of the Consular Convention. I will next demonstrate that Germany, and only Germany, has the burden of establishing that its claims are well founded in fact and law. I will then argue that the Optional Protocol does not confer on the Court jurisdiction over the exercise of diplomatic protection and that, even if the Court has jurisdiction based on diplomatic protection or on individual rights, in the present case such claims are inadmissible for failure to exhaust local remedies. I will then explain the role of LaGrands' lawyers and emphasize that it does not excuse non-exhaustion of local remedies and that international law regards a defendant and his or her lawyer as one entity for purposes of local remedies. Finally, I will show that Germany is invoking against the United States standards which it does not follow in its own national practice and explain why this should have an adverse impact on the question whether this Court should consider the German claims and on the merits of those claims.

The jurisdiction of the Court is limited by the terms of the Optional Protocol and the Consular Convention

3.4. The German Memorial recognizes "the prima facie nature of findings on jurisdiction and admissibility within a procedure on Provisional Measures"[17]. While not contesting the Court's jurisdiction under the Optional Protocol to enter a judgment regarding breach of the duty of notification, the Counter-Memorial reserves the right of the United States to challenge the jurisdiction and admissibility of the remaining claims of Germany[18]. The position with regard to the competence of the Court over such claims is thus wide open. As Professor Rosenne wrote, "the Court can deal with questions of jurisdiction in the course of determining the merits"[39]. The distinguished counsel for Germany, Mr. Khan, referred yesterday to a statement by Professor Rosenne concerning time-limits on objections to jurisdiction. I refer the Court to page 843 of Rosenne's book where he makes it clear, in a passage which Mr. Khan did not cite, that those limits concern exclusively cases where the object is to prevent any further pleading on the merits of the case, and thus to terminate the proceedings. This was not the position here, of course. Rosenne continues, "Other matters relating to jurisdiction or the ability of the Court to continue with the proceedings up to the decision on the merits may be raised by either of the parties as the pleadings progress."[40]

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[17] Memorial of the Federal Republic of Germany, paras. 3.12, 3.78.

[18] Counter-Memorial of the United States of America, para. 48.

3.5. Let me start by confirming that we continue to uphold the points already made in the Counter-Memorial.

3.6. Germany claims that "the entirety of the claims" put forward in its Memorial is both within the jurisdiction of the Court under the Protocol and admissible[41]. The United States disagrees. The Optional Protocol, Mr. President, is not a giant vacuum cleaner which sweeps up every allegation of fact or of law, whether or not it has anything to do with the interpretation or application of the Consular Convention, or however remote or however weak the evidence and its basis in law.

3.7. We submit that it is the function of this Court to assess every claim and every submission by Germany as to its being logically and inherently situated within the provisions of the Optional Protocol and the Consular Convention. As the Court itself stated in the *Fisheries Jurisdiction* case, it is for the Court itself "to determine on an objective basis the [real] dispute"[42] that has been submitted to it. I refer the Court also to page 1209 in Professor Rosenne's book.

3.8. Aware of the speculative nature of its claims, Germany has tried to shift the burden of proof to the United States. Following on the Memorial, the distinguished counsel for Germany,

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[39] 2 Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996* , p. 531 (3rd. ed. 1997).

[40] Rosenne, *supra* Note 3, p. 843.

[41] Memorial of the Federal Republic of Germany, para. 1.11.

[42] *Fisheries Jurisdiction (Spain v. Canada), I.C.J. Reports 1999*, para. 30.

Mr. Donovan, argued yesterday that the Court should "presume causation". With all due respect, such an attempt stands international law on its head. Germany wants the United States to show that the breach did not cause prejudice to the LaGrands. But surely international law teaches that the burden to prove prejudice and any other element of a claim rests on the Applicant before this Court.

3.9. The principle *actori incumbit probatio* is well established in the jurisprudence of this Court. As the Court stated in the *Nicaragua* case *(Jurisdiction and Admissibility)*, "it is the litigant seeking to establish a fact who bears the burden of proving it"[43]. The Court "cannot . . . apply a presumption that evidence which is unavailable would, if produced, have supported a particular" point of view[44].

The Optional Protocol does not confer on the Court jurisdiction over exercise of diplomatic protection

3.10. It is unclear what Germany means by "diplomatic protection" in the present case and what the consequences of its invocation are in this context. With respect, there is nothing between this case and espousal of economic claims in *Mavrommatis*.

3.11. Germany argues that the Optional Protocol confers upon the Court jurisdiction over the right of Germany to exercise diplomatic protection over the LaGrands[45]. The United States fully maintains the view already expressed that the customary law of diplomatic protection is not within the Court's jurisdiction under that Protocol[46].

3.12. Counsel for Germany and its revised submissions fashion a special rule for cases of a breach of the duty of notification in cases which involve capital punishment. There is no authority, however, Mr. President, for introducing the concept of punishment, even less a distinction between different punishments in the Consular Convention. If Germany wishes to have the Convention amended, so that special provisions for capital punishment are made, it should proceed differently to attain that end.

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[43] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) I.C.J. Reports 1984*, p. 437, para. 101.

[44] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), I.C.J. Reports 1992*, p. 399.

[45] Memorial of the Federal Republic of Germany, pp. 31, 33, para. 3.22.

[46] Counter-Memorial of the United States of America, p. 60, para. 74.

3.13. The duty of notification is, of course, not limited to capital cases and pertains to all cases involving arrest and detention, including immigration cases. Suppose that in some cases of breach, a State presents to this Court a diplomatic protection claim asking for compensation for a national, who, it alleges, lost a week's pay because he was detained without being informed of the right to have his consul notified. The new cases presented to the Court by Germany also involve typically rather trivial situations. Acceptance of the German argument would require the Court to adjudicate all such claims, present and future.

3.14. The Memorial itself recognizes that the right of Germany to exercise diplomatic protection is founded on international, i.e., on customary law[47]. I refer the Court to Professor John Dugard's first report to the ILC on Diplomatic Protection which explains the customary nature of this topic[48].

3.15. Diplomatic protection, Mr. President, under customary law is outside the jurisdiction parameters created by the Optional Protocol.

The *Nicaragua* Judgment establishes a clear separation between jurisdiction over treaty and jurisdiction over custom

3.16. The Court's Judgment in the *Nicaragua* case provides a clear authority, I submit, for separation between jurisdiction over treaties and jurisdiction over customary law. Already in its Judgment of 1984, the Court stated

> "the fact that [certain] principles . . . have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions"[49].

Even if a treaty norm and a customary norm were to have exactly the same content, each would have — and I quote the Court again — its "separate applicability"[50]. In a pronouncement, which I believe is authoritative for the present case, the Court, in its 1986 Judgment on the Merits, stated:

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[47] Memorial of the Federal Republic of Germany pp. 114-116, paras. 4.87-4.90 (Sept. 16, 1999).

[48] *UNGAOR*, Int'l Law Comm., 52d Sess., United Nations Doc. A/CN.4/506, at p. 1, para. 36 (2000).

[49] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 424, para. 73.

[50] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 94, para. 175.

"two rules of the same content are subject to separate treatment as regards organs competent to verify their implementation depending on whether they are customary rules or treaty rules"[51].

3.17. Acting on this distinction between treaty and custom and invoking the United States multilateral treaty reservation, the Court in the *Nicaragua* case, refused to apply certain multilateral treaties, but did apply customary law based on the acceptance by the parties of the compulsory jurisdiction of the Court under the more general grant of jurisdiction through Article 36, paragraph 2, of its Statute. That general grant of jurisdiction, we all remember, is not valid for the present case. In the *LaGrand* case which involves Article 36, paragraph 1, of the Statute, the Court has jurisdiction only over one particular treaty, the Consular Convention. It lacks jurisdiction over customary law of diplomatic protection. The principle governing the present case is thus exactly the same as that governing the scope of the Court's jurisdiction in *Nicaragua*, but the components are reversed. The United States is simply asking this Court to apply here the same principle that it applied against the United States in the *Nicaragua* case.

3.18. The learned counsel for Germany will be quick to point out that in the case concerning *United States Diplomatic and Consular Staff in Tehran*, the United States, invoking among others the Optional Protocols to the Vienna Diplomatic and Consular Conventions, itself made claims "in its own right and in the exercise of the right of diplomatic protection"[52]. Any resemblance between these two cases, however, is superficial and any such reliance would be totally out of context. In the *Hostages* case, in contrast to the present case, there was an inextricable link, a Gordian knot if you will, between the claims and the roles of the United States as the victim State, and the continuing breaches of the Diplomatic and Consular Conventions with regard to their most fundamental aspects: inviolability of diplomatic and consular premises and the illegal detention and mistreatment of the person of diplomats and consuls.

3.19. Only two of the hostages were private individuals. The rest were diplomats and consuls. Although the very fact of these two persons being held hostage on the Embassy grounds resulted in their coming under the umbrella of the diplomatic conventions, the Court itself chose to cite in reference to these two individuals the protection of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran[53], thus recognizing the distinction between private individuals (under the Treaty of Amity) and official persons (under the diplomatic conventions). Moreover, the *dispositif* — and this is what counts here — the *dispositif* of the Judgment makes no mention of diplomatic protection. Clearly departing from the language of the United States submissions, the Court referred only to the direct injury caused to the United States: "decides that Iran is under an obligation to make reparation to the Government of the United States for the injury caused to the latter"[54].

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[51] *Id.*, at pp. 95-96, para. 178.

[52] Case concerning *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 6, para. 8 *(c)*.

3.20. It follows from all of this that the Court's jurisdiction under the Optional Protocol to the Consular Convention does not extend to any question of diplomatic, let me stress, diplomatic protection.

The LaGrands have failed to exhaust local remedies

3.21. Should the Court, nevertheless, decide that it has jurisdiction over the diplomatic protection of the LaGrands or on the basis of a breach of any individual right, the requirement of exhaustion of local remedies would bar further consideration of such claims. As Professor Rosenne observes, the Court can deal with pleas in bar in whatever manner it finds appropriate[55].

3.22. In his statement yesterday, the distinguished Co-Agent of Germany, Professor Simma, conceded that claims with regard to diplomatic protection, or to individual rights, are subject to the requirement of exhaustion of local remedies. So did the Memorial[56]. Germany asserts, however, that all remedies available to the LaGrands "within the judicial system" of the United States have been exhausted[57]. We shall show that this assertion is not accurate.

3.23. Germany gives the requirement of exhaustion of local remedies a novel reading, one which would radically depart from the rich practice and jurisprudence of international law on local remedies. It complains that "[t]he United States lew does not provide an effective remedy for the breach of the requirement of notification in the case that the omission of consular notification is discovered after a defendant has been convicted in a jury trial"[58].

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[53] *Id.*, at p. 26, para. 50.

[54] *Id.*, at p. 45, para. 95 (5).

[55] *Supra*, Note 3, at 840 (1997).

[56] Memorial of the Federal Republic of Germany, p. 184, para. 5.16.

[57] *Id.*, paras. 5.17, 3.23.

3.24. By these very statements, I submit, Germany concedes that remedies *are* available prior to conviction by jury and at the state level. The specific breach claimed by Germany is the breach of the duty to inform. This breach, Mr. President, could easily have been remedied at the trial stage, if raised in a timely fashion. The judge would have enabled consular notification to be given and consular assistance could have been provided for the entire continuation of the proceedings.

3.25. But — I regret to say — Germany would have the Court rewrite American law, as well as international law, by insisting that certain remedies, if unexhausted at the level specified by national law, must be available additionally at a different level, in different courts. But surely this matter is entirely up to the sovereign State to decide.

3.26. Germany argues that the United States is in breach of international law by not providing additional — I emphasize the word "additional" — recourse at the federal level. There is, of course, no entitlement in international law, to a second-level, *habeas* type, review of claims that were not raised in state courts. Rules pertaining to procedural default do not violate any international obligations of the United States. They are a reflection of the United States federal system which discourages unnecessary federal involvement in matters retained by the states. And Article 36, paragraph 2, deals with quite different matters, such as prison visitations, etc., as my colleagues will further explain.

3.27. Even if an obligation to provide for remedies for the breach through the system of criminal justice existed, it would be entirely within the classical tradition of international law to accept that a State may require exhaustion of remedies before a particular court or type or level of courts and within a particular procedural framework. The whole meaning of exhaustion of local remedies is that the defendant State is given an opportunity to redress a breach within its domestic legal system, by allowing resort to courts, institutions, or officials, as determined by the national law and in compliance with such specific limitations as timing and procedures to be followed, in order to avert a breach of international law. These propositions, Mr. President, are self-evident.

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[58] *Id.*, at p. 75, para. 4.25.

3.28. The requirement of exhaustion in international law encompasses procedural default and the timely raising of claims. When a person fails, for example, to sue in national courts before a statute of limitations has expired, the claim is both procedurally barred in national courts and inadmissible in international tribunals for failure to exhaust local remedies.

3.29. In the *Ambatielos* arbitration[59], to which I draw the Court's attention, the person whose cause Greece espoused and brought before the arbitration, had failed to call before the trial court a witness essential for the success of his action. Such evidence could not be introduced in the Court of Appeal. The arbitral commission ruled that the failure amounted to "non-exhaustion of the local remedy available ... [in the trial court]" and that the case was therefore inadmissible.

3.30. The *Ambatielos* case, I submit, is instructive for the present case, where the breach could have been challenged in a timely fashion — but was not challenged — at the state level. The fact that in such circumstances the challenge could not be made at the federal level violates no rule of international law. Nor does it cure this non-exhaustion of local remedies, which is fatal to the admissibility of the claim before this Court.

3.31. Should the German Government consider, however, that the *Ambatielos* approach is harsh, we recall that *Ambatielos* was confirmed and followed, with full citation and attribution, by the European Court of Human Rights in the case of *Cardot* v. *France*. In finding Cardot's application inadmissible for non-exhaustion, the Court stated that exhaustion of local remedies requires

> "that the complaints intended to be made subsequently at Strasbourg should have been made to those same [domestic] courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law"[60].

3.32. The case of Cardot is not the sole example of this approach by the European Court of Human Rights. In *Barbera, Messegué and Jabarodo* v. *Spain*, for example, the convicted persons argued that the last-minute substitution of one judge with another whom they considered biased, violated their right to a fair trial. They had not protested the change at the trial level, however, and the Court found the claim on that particular issue to be inadmissible[61].

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[59] *Ambatielos* claim *(Greece* v. *U.K.)* (1956), 12 *UNRIAA* 120.

[60] *Cardot* v. *France*, 200 Eur. Ct. H.R. para. 34 (1991).

3.33. The fact is that most countries — I emphasize most countries — have varieties of rules parallelling in some respects the United States rules of procedural default. International tribunals have upheld such rules and found the cases inadmissible for non-exhaustion of local remedies.

The failure of attorneys to raise the breach at the appropriate stage and time of the proceedings does not excuse non-exhaustion of local remedies

3.34. In trying to explain away the fact that the LaGrands did not raise the breach as required by the law of the United States and thus to excuse non-exhaustion of local remedies, Germany argues that they were unaware of the Convention's provisions[62].

3.35. In most cases, however, Mr. President, the law is complicated and the role of challenging breaches is carried out by attorneys, as Germany itself recognizes[63]. The rule of exhaustion of local remedies, one of the cardinal rules of international law, would lose any viability should defendants not be bound by the acts of their attorneys. The law has always assumed that a defendant and his or her lawyer appear as one single entity in terms of legal positions.

3.36. Germany itself recognizes that it was the duty of the attorneys to discover and to challenge the breach[64]. It blames Karl LaGrand's attorney, who could and should have raised the breach and considers him inadequate for his tasks. It did not question the competence of Walter LaGrand's attorney, although it was Walter LaGrand who was the subject of the provisional measures indicated by the Court in its Order of 3 March 1999.

3.37. Even if consular notification were, in exceptional cases, relevant to the administration of justice, it would be the duty of attorneys to raise the matter at an appropriate stage and in a timely fashion. In the LaGrand case, the defence counsel were free at all times to ask Germany for assistance.

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[61] *Barbera, Messegue and Jabardo* v. *Spain*, 146 Eur. Ct. H.R. Series A, para. 59 (1988).

[62] Memorial of the Federal Republic of Germany, p. 12, paras 2.07, 4.05, 4.81.

[63] *Id.*, at p. 85, paras 4.41, 4.42.

[64] *Id.*

3.38. We do not claim, Mr. President, that court-appointed lawyers are always the best. But the conclusions of the United States courts that Karl LaGrand's lawyer provided a constitutionally sufficient level of representation should not be, I submit, second-guessed. Those conclusions merit deference.

3.39. Given the independence of the bar in the United States as in many other countries and the fact that, in the United States, lawyers for the defence and the prosecutors are adversaries rather than partners, the state of Arizona could not ask to be privy to the defence strategy of the lawyers for the LaGrands. It could not tell them what challenges to raise, nor even enquire why certain arguments were or were not made.

3.40. A judgment of the European Court of Human Rights in the case of *Kamasinski* v. *Austria* directly supports the position of the United States. An American citizen convicted in Austria for criminal offences raised a plea of nullity for inadequate representation by counsel[65]. The Supreme Court of Austria rejected that plea on the ground that it was the duty of the regional court to appoint a defence lawyer, but not to supervise his activities[66]. Emphasizing the principle of the independence of the legal profession, the European Court considered that "a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes"[67].

3.41. The Court refused to distinguish between the acts of the defendant and his counsel, insisting that "Kamasinski must be identified with the counsel who acted on his behalf, and he cannot therefore attribute to the respondent State any liability for his counsel's decisions"[68]. The court reached its decisions despite the court's recognition that Kamasinski, as someone who was not a long term-resident of Austria, was unfamiliar with Austria's legal system. In contrast to Kamasinski, the LaGrands could not claim any lack of familiarity with the United States system.

3.42. The European Commission of Human Rights has also held that the advice of lawyers that a further remedy would be useless does not constitute a "special circumstance" "absolv[ing] the applicant from exhausting that remedy"[69]. It followed this view even where similar advice was given to the applicant by both his counsel and the judge[70]. In another case, the Commission held that advice given by lawyers "did not dispense with or modify" the need to comply with the requirements of exhaustion[71]. I refer the Court to Amerasinghe's summary of the law, which I would like to include in the transcript[72].

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[65] *Kamasinski* v. *Austria*, 168 Eur. Ct. H.R. Series A, para. 35 (1989).

[66] *Id.*, at para. 37.

[67] *Id.*, at para. 65.

[68] *Id.*, at para. 91.

[69] *Simon Herold* v. *Austria*, Application No. 4340/69 (1971), 38 Collection of Decisions 33.

Germany is invoking against the United States standards which it does not follow in its own practice

3.43. Admissibility is not just a technical question of international law. In certain circumstances, it raises fundamental questions of fairness and equity and requires special judicial prudence. I submit that the present case belongs to this category.

3.44. Despite its harsh condemnation of the United States rule of procedural default, Germany insists on the benefit of similar rules, when it appears as a defendant. In application *I.H.* v. *Federal Republic of Germany* concerning a conviction of an applicant by a German regional court, a conviction confirmed on appeal by a German federal court, the Federal Constitutional Court found the constitutional complaint inadmissible because "it had not been complained of within the time-limit provided for in the Federal Constitutional Court Act"[73]. The European Commission on Human Rights decided that "in these circumstances [the applicant] cannot be considered as having exhausted the remedies available to him under German law". There is little difference, if any, between the approach of the United States courts and that followed by the German (Federal) Constitutional Court in this case.

3.45. Even in cases of denial — outright denial — of court-appointed counsel to an indigent defendant — in this case a Turkish national — for a complicated appeal hearing, Germany has opposed the quashing of convictions, arguing, in drastic contrast to its position in the LaGrand case, that there was no prejudice to the defendant[74]. Not surprisingly, the European Court of

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[70] *Id.*

[71] *X* v. *Belgium*, Application No. 1488/62 (1963), 13 Collection of Decisions 96.

[72] C. F. Amerasinghe, Local Remedies in International Law 213 (1990):

> "Mere doubts as to the existence or effectiveness of a remedy do not exempt the individual from exercising a remedy, nor does bad advice given by counsel or his opinion or the personal opinion of the individual as to the probability of success of a remedy or as to expediency and tactics in handling his case."

[73] *I.H.* v. *Federal Republic of Germany* (unpublished), (12 Feb. 1990).

[74] *Pakelli* v. *Germany*, 64 Eur. Ct., para. 40 (1983).

Human Rights, invoking "the interests of justice"[75], found Germany in breach of Article 6 (3) *(c)* of the European Convention, a provision comparable to Article 14 (3) *(d)* of the International Covenant on Civil and Political Rights, to which Germany is also a party. Significantly, the European Court recognized that under the Convention it was not "empowered" to support annulment of the judgment of the Federal Court[76].

3.46. Thus, Mr. President, throughout the present proceedings, Germany attempts to have a different standard applied to the United States than that which it follows in its own national practice. Germany has not shown that its system of criminal justice requires annulment of criminal convictions where there has been a breach of the duty to provide consular notification. Even yesterday, it did not argue that in its national practice it reviews or annuls convictions on the sole ground of such breach. Cases cited in the United States Counter-Memorial demonstrate that where United States citizens in Germany who had not been given consular notifications were sentenced to imprisonment, Germany, while apologizing to the United States, did not even mention the possibility of quashing the convictions[77]. There are additional cases of Americans detained in Germany who have not been notified of the right to have their consul informed of their detention. I draw the attention of the Court to the supplemental declaration we filed yesterday, by Elizabeth Swop. In no case, anything more than an apology was offered to the United States. I conclude that in its own practice Germany does not follow what it asserts in the *LaGrand* case as the correct interpretation of the Consular Convention, i.e., that the breach of duty of notification has consequences in the national criminal procedures and requires the quashing of the convictions and sentences made in the absence of notification.

3.47. What are the implications, Mr. President, for the readiness of the Court to consider the German claims of the fact that Germany does not accept as binding for itself certain norms that it has invoked as categorically binding for the United States? The United States is asking this Court to consider whether Germany should not be precluded from raising, against the United States, alleged rules that it itself does not follow. But this matter presents not only a question of preclusion. It indicates that the interpretation of the Consular Convention which is asserted by Germany has not become a part of international law binding on the United States.

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[75] *Id.*

[76] *Id.*, at para. 45.

[77] Counter-Memorial of the United States of America, p. 64, paras. 78, 79, Exhibits 8-11.

3.48. The United States is not invoking here a claim of *tu quoque*. It wishes, rather, to raise two other arguments. First, basic principles of administration of justice and equality of the parties require that both litigants in these proceedings be accountable to the same rules of international law. It would be against such principles of international law to apply against the United States alleged rules that Germany appears not to accept for itself.

3.49. The second argument relates to the status of the alleged rules as international law. The rules alleged by Germany are at best uncertain. In areas of uncertainty of the law, the fact that the other party itself resorts to a contested practice has the effect of diluting the status of the alleged rules of international law[78].

3.50. The German national practice has the effect of rendering inappropriate the German invitation to this Court to adopt its asserted interpretation of the Consular Convention. Thus, the German assertions involve not only a question of fairness to the defendant State but also a challenge to the principles of administration of justice to which this Court has always been committed.

3.51. Moreover, since the German domestic practice as well as the US domestic practice reflect, as we shall demonstrate, the general practice of States parties to the Convention, there has been a general rejection by States of the interpretation of the Consular Convention that Germany is asserting against the United States in the present case.

3.52. Were the German interpretation of the Consular Convention accepted, all States parties would currently be in breach, weakening any incentives to a better implementation of the Convention.

3.53. As the applicant State, it was the duty of Germany to establish the correctness of its asserted interpretation of the Consular Convention. This Germany has clearly failed to do.

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[78] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 40 (1989).

Conclusions

3.54. In concluding, I drew the attention of the Court to its statement in the *Northern Cameroons* case that

> "even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore.
>
> ……………………………………………………………………
>
> That function is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case."[79]

I take the liberty, Mr. President, of suggesting that in the present case which rests on an interpretation of the Consular Convention which neither Germany nor any party to the Consular Convention accepts and follows in its own national practice, it may be appropriate for the Court, as a court of justice, to exercise its judicial discretion to entertain the case.

3.55. This, Mr. President, concludes my presentation. I thank you for your patience, distinguished Court, and would appreciate it if you, Mr. President, would call now on Ms Catherine Brown.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. I now give the floor to Ms Catherine Brown.

Ms BROWN:

4.1. Mr. President, distinguished Members of the Court, it is an honour for me to appear before you again today. My focus will be the United States response to the breach in this case and the question whether the Vienna Convention on Consular Relations requires any different response. I will in particular address whether the Convention requires States party to provide remedies in their criminal justice systems to foreign nationals who have not been informed, in accordance with Article 36 of the Convention, that they could request consular notification. Germany has constructed a fanciful theory in an effort to persuade the Court to answer this question "yes". The United States submits that the answer in fact is indisputably "no", and that the Court would seriously distort the framework in which consular relations are conducted were it to conclude otherwise. I propose today first to discuss briefly the actions that the United States has taken in response to the breach in this case and the overall question of United States compliance with Article 36. I will then address the requirements of the Vienna Convention and show that it provides no basis for requiring the remedy in municipal law that Germany seeks to have imposed on the United States.

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[79] Case concerning the *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, I.C.J. Reports 1963*, pp. 29-30.

The United States has investigated the alleged breach; apologized to Germany; and undertaken a significant broad effort to improve its compliance with the requirements of Article 36

4.2. Mr. President, it is well known that the United States regards the Vienna Convention as a Convention that establishes State-to-State rights and obligations, not individual rights that inhere in the individual and that must be justiciable in the criminal justice system. This conception of the Convention underlies our view that breaches of Article 36 of the Convention need not be remedied in the criminal justice process. We believe that Germany held the same view until it recently decided that it would be useful to reinterpret the Convention for purposes of cases involving capital punishment. Accordingly, both the United States and Germany historically have followed the practice of investigating alleged violations of Article 36, apologizing if appropriate, and undertaking to improve future compliance. Neither country has provided for remedies in its criminal justice system for such violations, which are common in both countries. In some recent cases involving foreign nationals in the United States sentenced to capital punishment, we have also taken the additional step of asking the relevant authorities to consider the fact of the violation as a relevant but not dispositive factor weighing in favour of a possible grant of clemency. This is consistent with our view that the remedies are political, not judicial.

4.3. Our response to the breach of Article 36 in this case followed this pattern insofar as possible, given that Germany raised the consular notification issue with the United States only two days before Karl LaGrand's scheduled execution, in the letter from Foreign Minister Fischer that is before the Court as Exhibit MG 18. Germany's previous communications had sought clemency solely on the basis of opposition to the death penalty[80].

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[80] MG 14, 15, and 16.

4.4. Consistent with the prior practice of the United States and Germany, once we had confirmed that a breach had actually occurred — which was not until many months later — we expressed the regrets and extended the official apologies of the United States to Germany, and we advised Germany in detail of the steps being taken in the United States to prevent future recurrences. We also provided Germany with a report of our investigation, and we offered to answer any questions Germany might have about it. That was done by the diplomatic note that is Exhibit 2 to the Counter-Memorial.

4.5. In our diplomatic note, we assured Germany of the seriousness with which the United States regards consular notification and we fully accepted the need to improve observance of the requirements of Article 36. The efforts the United States is taking to improve compliance are recounted both in the note that is Exhibit 2 and in Exhibit 3 to the Counter-Memorial, but they have continued since those exhibits were prepared. Secretary of State Albright has fully and personally supported these efforts from the beginning, as has Attorney-General Janet Reno of the United States. The centrepieces of the effort have been our 1998 brochure and pocket card, which have been made available to the Court. As of today, we estimate that we have distributed over 60,000 copies of the brochure, and over 400,000 copies of the pocket card to federal, state, and local law enforcement and judicial officials throughout the United States.

4.6. We are also conducting training programmes throughout the United States, some in co-operation with consular officials of other countries, such as Mexico, that have taken a genuine interest in helping us improve observance. We are reaching out to all levels of government. While we have traditionally, as you heard from Attorney-General Napolitano, regarded arresting and detaining officials as the competent authorities for purposes of Article 36, we are also including judicial officials in our outreach effort, and are asking them to confirm that consular notification requirements have been observed with respect to foreign nationals who appear before them. We specifically called this initiative, which is a change in our prior practice, to Germany's attention, because it directly addresses the confusion that arose in the case of Karl and Walter LaGrand. Most recently, Secretary of State Albright has personally decided to establish in the Department of State a permanent office to focus on US and foreign compliance with consular notification and access requirements.

4.7. We were frankly disappointed yesterday to hear Germany disparage these efforts, as if they were not genuine or were not having an impact. It went to great lengths to characterize them as so ineffective that the Court should take the extraordinary step of ordering the United States to create remedies in its criminal justice system in death penalty cases. Leaving aside that the Vienna Convention provides no support for such a remedy — to which we will return later — Germany's characterization distorts reality. First, it is important for the Court to know that the United States has consistently sought to comply with Article 36 since it first became a party to the Vienna Convention in December 1969. Moreover, we had little reason to think that foreign governments were dissatisfied with our efforts until the 1990s. Germany certainly did not undertake to advise us of any serious concerns on its part — just as it did not raise the LaGrands' case with us between 1992 and 1999. Thus, our current effort is one that started relatively recently.

4.8. Second, the programme thus far has been far more successful than Germany allows. Indeed, Germany has affirmatively mischaracterized what is happening in the United States today. For example, its belated supplemental submission to the Court included a letter from California that Germany cited as evidence that California does not think that it has to comply with Article 36. We have in turn submitted a letter from California stating explicitly that it fully accepts the obligations of Article 36. What was missing from Germany's story was the fact that it was precisely in order to improve its compliance that California recently decided to incorporate the requirements of Article 36 into its state law. As I will explain later, we do not believe that the Convention requires such incorporation, and indeed relatively few parties to the Convention have chosen this approach. But we would think that Germany would welcome such an effort rather than criticize it. We certainly see no justification for misrepresenting the innocuous and clearly correct statement of a California official that the California statute was not in effect recently and therefore could not be violated until recently. I could describe similar positive efforts throughout the United States, and Attorney-General Napolitano this morning described efforts taken by the state of Arizona, including efforts to bring its judicial officials into the process, again directly responsive to the confusion that arose in the case of Karl and Walter LaGrand. Every day my office receives requests from law enforcement entities throughout the United States for our brochure and pocket card so that they can do what is required. Moreover, we have been told explicitly by foreign consular officials that they are receiving notification more often as a result of our efforts.

4.9. The list of cases of alleged violations discussed yesterday by Mr. Simma does not diminish our confidence that our programme is being felt. The list is little different from a list the United States might prepare about Germany or any number of countries, as shown by the supplemental declaration we have submitted from Elizabeth Swope, the Secretary of State's Senior Co-ordinator for Consular Notification. Germany fails to recognize that consular notification never works perfectly, in Germany, in the United States, or elsewhere, and that consular officers routinely learn of their nationals in detention through a variety of means and at a variety of times in relation to the criminal process. To the extent that the list shows that German consular officers learned of cases through family members, direct contacts of foreign nationals, or in other ways, it is simply illustrative of the realities of consular practice. The same variation in methods of notification is evident in at least one of the cases of non-compliance by Germany identified by Ms Swope's declaration, and is amply documented in our state practice survey, which is Exhibit 8 to our Counter-Memorial.

4.10. More importantly, Germany utterly fails to recognize what is involved in ensuring compliance. The United States is a country covering roughly 9.2 million square kilometres, as compared to Germany's roughly 350,000 square kilometres. Our population of 270 million compares to Germany's of less than 83 million. As you have heard this morning, we have a unique federal structure. In fact, arresting and detaining authority in the Untied States is decentralized not only between the federal government and the states, but also within the federal government and within the states. By one estimate, there are over 700,000 law enforcement officials in the United States and they are working in over 18,000 different jurisdictions.

4.11. This is not to excuse, but to explain. The United States has embarked on what we see as a long-term, permanent effort to address the question of compliance with Article 36. We do not need any additional requirement of compliance with Article 36, because we fully understand and our states fully understand that it has the force of law in the United States and can be implemented directly. The problem instead is one of reaching a highly diverse and enormous number of relevant officials in a large number of law enforcement jurisdictions through long-term, persistent training programmes. Germany's criticism of the programme ignores these factors and frankly suggests a *naïveté* about the United States, surprising from a country that has purported here to make definitive representations about the American judicial system, and a country that has its own compliance problems in a much smaller and much less complex environment.

4.12. In any event, it is wrong to belittle the United States position that Article 36 breaches are appropriately addressed through a process of investigating, apologizing, and undertaking a genuine good-faith effort to do better in the future. In her authoritative commentary on the Vienna Convention on Diplomatic Relations, Eileen Denza has observed that the Diplomatic Convention has been remarkably successful in winning support and observance. One reason, in her view,

> "is that reciprocity forms a constant and effective sanction for the observance of nearly all the rules of the Convention. Every State is both a sending and a receiving State. Its own representatives abroad are in some sense always hostages."[81]

The same can be said of the Vienna Convention on Consular Relations. States party know that the rules of conduct they urge upon others are ones that they must be prepared to live by themselves. Conversely, they know that the way in which they treat States party under the Convention may significantly affect the way they are treated. In this context, the response of the United States is anything but meaningless. It is a clear, public, and concerted message directed from the highest levels of the United States Department of State and the United States Department of Justice to the States party to the Convention, designed to assure them that we are indeed serious about Article 36, and that we fully expect to be held to the same standards domestically as we seek to hold them to with respect to American citizens abroad. We will continue our efforts regardless of the outcome of this case, and regardless of whether countries like Germany lose interest because their real focus is on capital punishment, not consular notification. By the same token, we can legitimately look askance at Germany's belated effort to establish a special rule for consular notification in cases of capital punishment, given that such a rule would have no reciprocal impact on Germany's own criminal justice system.

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[81] E. Denza, *Diplomatic Law*, 2nd. ed., 1998, p. 2.

The Vienna Convention does not require any different response

4.13. Mr. President, I would like to turn now to the question whether the United States response to the breach in this case has been inadequate under the Vienna Convention. Contrary to Germany's suggestions, the answer does not lie in deciding whether the Vienna Convention benefits individuals. The performance of consular functions inherently benefits individuals. Moreover, it is clear that Article 36, by recognizing the right of consular officials to communicate with and to assist their nationals, provides a benefit to those nationals. Nor does the answer turn on whether Article 36 recognizes the rights of individuals — it plainly does, by its terms. But that does not tell us much about the nature of those rights, or about the remedies required under the Vienna Convention for breaches of Article 36. The relevant question is whether the obligation to inform a foreign national that he can request consular notification must be integrated into a receiving State's criminal process and treated as so fundamental to that process that the possibility of undoing the process must exist if this obligation is not observed. The answer to this question, again, is clearly, no. This is not to say that informing an individual cannot in some cases lead to the provision of consular assistance that might be useful in a criminal defence. But this possibility is not a sufficient basis on which to conclude that the Convention makes consular notification integral to the criminal justice process or requires States parties to establish remedies in their criminal justice systems for a failure to inform a foreign national that he may request consular notification.

The text of the Convention does not support Germany's position

4.14. In some sense our enquiry could begin and end with the text of the Convention. Let me note a number of significant omissions that speak directly to Germany's claim. The Convention's title, of course, tells us simply that the Convention's subject is consular relations between States. It makes no reference to criminal matters, nor to individuals, and it in no way suggests that the Convention purports to address the internal criminal justice systems of States party, or questions of individual rights in the criminal process.

4.15. The same is true of the Preamble to the Convention, which expressly says that the Convention is addressed to consular relations and the development of friendly relations among nations. The Preamble's one reference to rights that might be thought to benefit individuals in a judicial context — privileges and immunities — is immediately qualified by a statement that such privileges and immunities are intended not to benefit individuals but States. Germany has argued that this qualification pertains only to the privileges and immunities granted to consular officers by the Convention, and not necessarily to Article 36. But even if we were to accept this as true, it does not change the fact that the Preamble tells us that the Convention is fundamentally intended to regulate consular relations between States and to benefit States, not individuals.

4.16. Again, this is not to say that Article 36 does not benefit individuals: clearly it does. But it is titled "communication and contact with nationals of the sending State". It is in a section titled "facilities, privileges and immunities relating to a consular post", and it is in a chapter titled "facilities, privileges and immunities relating to consular posts, career consular officers and other members of a consular post". These headings, again, are consistent with the fundamental focus of the Convention, which is the right of States, not individuals. And, again, nothing in them suggests that we are reading a provision that in any way addresses the substantive or procedural criminal laws of the member States.

4.17. Yesterday, our German friends spent considerable time walking the Court through the actual text and structure of Article 36. As someone who practices consular law on a daily basis, I must confess to having been quite interested in the reading given to this Article by three academicians. There is quite a difference in perspective, and frankly I have no hesitation in suggesting to the Court that the academicians turned Article 36 on its head. An afterthought provision took on exaggerated importance, and the essence of Article 36 was pretty well obscured.

4.18. Germany glossed quickly over the fact that paragraph 1 of Article 36 begins with the important words "With a view to facilitating the exercise of consular functions relating to nationals of the sending State". These words introduce all three of the following subparagraphs, and of course they give no support to the notion that the rights and obligations enumerated in paragraph 1 are intended to ensure that nationals of the sending State have any particular rights or treatment in the context of a criminal prosecution.

4.19. The academicians also failed to appreciate the significance of the first subparagraph of Article 36, paragraph 1, which states a general principle — "consular officers shall be free to communicate with nationals of the sending State and to have access to them" — and its reciprocal principle. It is this freedom of communication that is the most important right articulated in Article 36, because communication is essential to the sending State's ability to perform its consular functions. Subparagraph (1) *(a)* states a general principle that is entirely sufficient whenever the freedom of movement of the consular officer and the foreign national is unconstrained. Does it recognize a right of individual communication? Yes. But does it suggest that that right is independent of the right of the sending State? No. In fact, it was precisely because the right of the individual flows from the right of the sending State that the negotiators ordered the two sentences as they did, reversing the original order proposed by the ILC. And does Article 36, paragraph 1 *(a)*, relate the right of the individual to a criminal proceeding? Again the answer is no. And this omission is significant because, as Professor Trechsel will elaborate, there are many contexts in which criminal proceedings can take place while the foreign national remains at liberty.

4.20. Now, finally, we get to Article 36, subparagraph 1 *(b)*. It deals with the particular situation that arises when a foreign national is detained. It is addressing the special problems of consular communication that arise when a foreign national is in detention. Because he is detained he and the consular officer cannot exercise the fundamental rights stated in subparagraph 1 *(a)* unless they get some help. It is for this reason that we have the special provisions in subparagraph 1 *(b)* about informing consular officers of detentions and forwarding communications.

4.21. Of course, notification of the detention under the Vienna Convention is required only if requested by the foreign national, and as we can see from the negotiating history, it is because of this limitation introduced as a modification to the ILC draft, that we also find in the final sentence of subparagraph (1) *(b)* the requirement that the authorities of the receiving State inform the detained foreign national of his rights to have this consular official notified and his communications forwarded. Germany yesterday advanced the suggestion that this final sentence — the one that the United States failed to observe — is the most important provision in Article 36. And from this it attempted to argue that therefore necessarily every other provision in Article 36 was violated. In fact, this final sentence was included in the text only at the last minute out of a concern that the foreign national might not know that he could request consular communication. But then again, he might. He might well be aware of the possibility, or his family might be aware of it, or he might be contacted by a diligent consular officer, regardless of being informed. Indeed it is not unusual for consular officers to learn of their nationals in detention through these alternative methods. The final sentence of Article 36, subparagraph 1 *(b)*, is, in essence, a prophylactic measure. It is not enshrined as an individual right of the individual to be informed. It is not: "The person concerned shall have a right to be informed." It is simply that the competent authorities "shall inform the person without delay of his rights". I suggest that this choice of words is not insignificant. That is, the sentence expresses an obligation that the receiving State undertakes to the sending State; it is the sending State that has the right to have its national informed.

4.22. Our German friends' most significant error, however, lies in their assumption that the rights established by Article 36 are designed to be integral to the criminal process. They seem to rest this argument on the requirement that notification must occur without delay. I would note that they mischaracterized our position with respect to the meaning of "without delay", but that is not directly relevant to our point. Our point is that Article 36 is about consular communications and it is not related to the criminal process. For example, subparagraph *(b)* does not provide that the detained foreign national must be informed of his rights before any investigatory statement is taken, or before any particular step in the criminal process. It does not link informing the consular officer to any step in the process, such as the initiation of an investigation, the filing of charges, or the commencement of trial. It is simply operative in cases of detention, and its rules apply regardless of the reasons for the detention and regardless of when detention occurs in relation to the criminal process.

4.23. Only subparagraph 1 *(c)* of Article 36 touches directly on the question of legal proceedings, by providing that consular officers shall be entitled to arrange legal representation for a detained foreign national. By the same token, however, once the foreign national has legal representation, the purpose of this provision has been met.

4.24. There remains paragraph 2 of Article 36. Our Germany friends glossed over the fact that it is focused exclusively on the rights referred to in paragraph 1: first, the right of reciprocal consular communication and access; second, in the special circumstances of detentions, the right of the foreign national to have his consular official notified and to have his communications forwarded; and third, also in cases of detention, the right of consular officers to visit, converse, and correspond with their nationals and to arrange for their legal representation. It is self-evident that the laws and regulations relevant to the exercise of these rights are laws relating to communication and access, such things as the use of communications devices; how often can you send a letter? Can you use the telephone? Are you entitled to visit in person your own embassy? Are there curfews in place? Are there visiting hours in place? Or are there security procedures in place? If so, they may not be so restrictive as to defeat the purposes of the Convention. But a rule relating to the defences that a foreign national can raise in a criminal proceeding is utterly unrelated to any of the rights enumerated in paragraph 1. Germany's suggestion that paragraph 2 of Article 36 prohibits application of rules of procedural default to claims relating to breaches of Article 36, subparagraph 1 *(b)*, is far afield from the text, which would have to be substantially rewritten to get to Germany's result.

4.25. Accordingly, there is no basis for Germany's contention that the United States violated paragraph 2, or any provision in paragraph 1 other than the prophylactic obligation to inform the LaGrands that they could communicate with their consular officials if they wished. Germany has cited not a single factual instance or provision of law that interfered with or prevented any communication between the LaGrands and German consular officials. It has not identified a single failure to provide access. Nor has it identified any instance in which the LaGrands attempted to arrange legal representation for the LaGrands, much less an instance in which its ability to do so was obstructed.

4.26. I would like to make one further observation about the text, again focusing on a significant omission. Nothing in the Convention requires States parties to incorporate the Convention into their laws, or to provide remedies as part of their systems. This is in contrast, for example, with the International Covenant on Civil and Political Rights, which in Article 2, imposes express requirements for the adoption of necessary legislative measures and which requires States parties to ensure effective remedies. Clearly, when States have wished through international conventions to require changes in municipal law, they have found clear words to do so.

State practice under the Vienna Convention on Consular Relations also does not support Germany's suggestion that States party must provide remedies in their criminal justice systems for breaches of Article 36

4.27. Mr. President, it hardly seems necessary to turn to State practice. Yet I cannot help but mention that the prevailing practice of the over 165 States party to the Vienna Consular Convention overwhelmingly supports our position. Germany attempted to dismiss State practice yesterday for understandable reasons. It suggested that State practice is scarce, when in fact it is voluminous albeit not readily accessed by an academician. It also suggested that it is irrelevant either because violations occur in minor cases — which is an unsupported proposition — or because there is no practice in death penalty cases, a point that neglects the fact that the Vienna Convention does not address the nature of the sentence or even link consular notification to the criminal process. How it squares its approach with the Vienna Convention on the Law of Treaties — which it enthusiastically embraced yesterday — is unclear. In fact, the lack of support for Germany's position in its own practice or that of other States is of special significance, and not just because the Vienna Convention on the Law of Treaties attaches great weight to subsequent practice. I say this because the Vienna Consular Convention is not just another treaty. Rather, with the Vienna Convention on Diplomatic Relations, it has become the basic framework that defines the way in which the vast majority of the nations of this world conduct their diplomatic and consular conversation. I use the word "conversation" deliberately, to emphasize how much these Conventions have become part of the day-to-day argumentation and communication that occurs between governments as they dispute their various rights and obligations. Those of us who work in foreign ministries discuss these conventions internally and with other foreign ministries on a continual daily basis, and through this conversation and the day-to-day practical application of the Vienna Convention, Article 36 has indeed been infused with meaning.

4.28. The Court will find a detailed account of State practice under the Convention at Exhibit 8 to our Counter-Memorial, as I have already mentioned. Since Germany seems prepared to concede on this point, I will just note a few of the most salient points, several of which I have mentioned already.

4.29. First, compliance with consular notification is rarely perfect, and second, it is frequently discussed. Most significantly, there is no evidence that in this discussion States grant remedies in their criminal justice process for failures of notification. The significance of this cannot be overstated, given the frequency of the failures. Yet it surely reflects the view that Article 36 does not require that violations be remedied in the criminal justice process. Two clear examples are before the Court as Exhibits 10 and 11 to the Counter-Memorial. They are Notes from Germany to the United States apologizing and undertaking to do better, but in no way suggesting that the sentence imposed on the American in question should be set aside because of the failure of notification.

4.30. In recent years, of course, defence lawyers in the United States have attempted to persuade our courts to create remedies in our criminal justice system. We have not supported those efforts for all of the reasons that we are advancing before this Court. In addition, we cannot say that the obligation to request consular notification implicates issues of fundamental fairness that are not independently addressed by the considerable safeguards accorded to all defendants under the criminal laws of the United States.

4.31. A final consideration for us has been that it would be very difficult to craft suitable remedies that could be administered appropriately by criminal courts. On the one hand, a *per se* rule of returning to the *status quo ante* would surely lead to absurd results, particularly in cases like this, where the defendants were nominally Germans but were for all practical purposes Americans. On the other hand, a rule providing for remedies on a showing of prejudice would necessarily draw issues of State-to-State treaty violations into criminal defence litigation in a highly problematic way. For example, a defendant inevitably will insist that he would have requested that his consular representatives be notified if only he had been asked. He will persuade a consular officer, if he can, to submit an affidavit on his behalf that invariably will say that the officer — or his predecessor many years previously or some months previously — would have done any number of things that would have made a critical difference. How can we explore the veracity of these assertions? To do it fully and fairly, the prosecutor would need access to inviolable consular archives to determine the policies and resources that would have governed the consular officer's response. The prosecutor would also require a waiver of the consular officer's immunity from testimony, so that he could cross-examine the officer about his government's true commitment to consular assistance. In this case, for example, we have clear evidence that Germany did not react promptly when it learned of the LaGrands; that it provided no assistance to one of the Apelt's trial lawyers; and that it does not pay for lawyers for German nationals, but instead allows them to be represented by lawyers funded by US federal or state governments — to mention only a few potentially embarrassing facts. I would hope the Court would agree that, while a State party might choose to create such a process, the Vienna Convention does not require it to do so.

The negotiating history of the Vienna Convention on Consular Relations also does not support Germany's suggestion that States party must provide remedies in their criminal justice systems for breaches of Article 36

4.32. Mr. President, I have perhaps ten more minutes. I do not know if you wish to break at the customary time.

The PRESIDENT: If it is no more than ten minutes, let us go on.

Ms BROWN: Thank you. I will try to condense this.

4.33. I wanted to offer just a few observations about the negotiating history, which I cannot adequately summarize today. I would ask the Court to pay particular attention to our discussion of it in the Counter-Memorial.

4.34. I would like to focus on just a few points relating to the three major changes between the ILC draft and the final draft that are relevant to this case. One is the reversal of the two sentences in subparagraph 1 *(a)*, to which I have already alluded; the other is the change from the requirement in the ILC draft that all cases of detention be notified to the provision that notification only occur at the detained national's request, and the third is the change in paragraph 2 from the ILC's "must not nullify" proviso to the proviso that was finally adopted.

4.35. The debates that led to these changes clearly show that the formulation in Article 36, subparagraph 1 *(b)*, with its reference to informing the individual of his "rights" under that paragraph, was not adopted out of any desire to create or recognize individual rights that would be justiciable in municipal criminal justice systems. Rather, it is absolutely clear from the *travaux* that this was done to balance the State's right to protect its nationals with the individual's privacy interests and to minimize the burden on States.

4.36. During this discussion, I think it particularly significant that a delegate pointed out that the burden concerns raised by the original proposal could be addressed by countries waiving their rights to notification. The very fact that a delegate conceived of the concept of waiver clearly reflects an assumption that the rights of States were at issue, and indeed there should be no dispute that even today a sending State could advise a receiving State that the receiving State need not inform the sending State's nationals of the right of consular communication — for example, if the sending State determined that it was unwilling or unable to respond to requests for consular assistance.

4.37. The discussion that led to the revision of subparagraph 1 *(b)* also revealed the considerable unease that the delegates felt about the fact that the changes that were being introduced referred to individuals and their rights. It was for this reason, because of this discomfort, and to reinforce the character of the Convention as one relating to the rights of States, that the order of the two sentences that I have alluded to previously was reversed.

4.38. Finally, there is nothing in the *travaux* that supports the view that Article 36 was intended to have implications for the rights of individuals with respect to the substantive or procedural criminal laws of the member States other than those relating to communication, prison visits and rules of the kind I described earlier. Germany's remarks on this point yesterday are again far afield. It is not a question of the primacy of international law over municipal law. Clearly the proviso in subparagraph 2 would override a municipal law that provided that consular officers could not visit their nationals in detention, to take an extreme example. That is not the question. The question is whether Article 2 reaches the kinds of rules of criminal law and procedure that are relevant to the defence or to when claims must be made in criminal cases — rules that have nothing to do with the ability of consular officers to communicate with or to assist their nationals. I have previously explained why it is evident from the text that it does not. In the *travaux* it is clear from the ILC commentary, with its express references to rules relating to visiting nationals in prison, that the answer is no. Similarly, the delegates' discussion of paragraph 2 in no way suggests that they expected paragraph 2, even with the amended proviso, to have implications for the validity of the criminal process. Germany's suggestion that the proviso of paragraph 2 requires remedies in the criminal process is a fanciful invention that simply is not supported by the *travaux*, just as it is not supported by the text or by State practice.

4.39. Mr. President, in closing I would just like to offer a note of caution about the position taken by Germany in this case. Germany's goal plainly is to make Article 36 a tool of its current policy objective, which is expressly to seek elimination of capital punishment and, understandably, to protect its nationals from such punishment whenever possible. We have no problem with that goal, but we have considerable objection to Germany's method. Whatever Germany's official views about capital punishment, they provide no basis for effectively rewriting the text of the one nearly universal convention that provides the basic framework for the conduct of consular relations throughout the world. The States party to the Convention did not ratify it in the expectation that it would have the implications for their criminal justice systems that Germany seeks to have this Court impose on the United States.

4.40. I urge the Court to listen carefully to the conversation occurring every day in virtually every country of the world about issues of consular notification and access to which I have alluded. And I request that it reject Germany's invitation to drastically alter that conversation and the fundamental expectations of the 165 States party to the Vienna Convention on Consular Relations whose interests will inevitably be affected by the decision of this Court.

4.41. Mr. President, that concludes my presentation and I thank you for your patience. After lunch I would invite the Court to hear from my colleague, Mr. Mathias.

Le PRESIDENT : Je vous remercie beaucoup. La séance est levée. La Cour reprendra ses travaux cet après-midi à 15 heures.

L'audience est levée à 13 h 15.

CR 2000/29

International Court of Justice	**Cour internationale de Justice**
THE HAGUE	**LA HAYE**

YEAR 2000

Public sitting

held on Tuesday 14 November 2000, at 3 p.m., at the Peace Palace,

President Guillaume presiding

in the LaGrand Case
(Germany* v. *United States of America)

VERBATIM RECORD

ANNÉE 2000

Audience publique

tenue le mardi 14 novembre 2000, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président

en l'affaire LaGrand
(Allemagne c. Etats Unis d'Amérique)

COMPTE RENDU

Present:	**President**	**Guillaume**
	Vice-President	**Shi**
	Judges	**Oda**
		Bedjaoui
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
	Registrar	**Couvreur**

The Government of the Federal Republic of Germany is represented by:

Mr. Gerhard Westdickenberg, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Eberhard U. B. von Puttkamer, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Bruno Simma, Professor of Public International Law at the University of Munich,

as Co-Agent and Counsel;

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and at the European University Institute in Florence,

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Hans-Peter Kaul, Head of the Public International Law Division, Federal Foreign Office,

Dr. Daniel Khan, University of Munich,

Dr. Andreas Paulus, University of Munich,

as Counsel;

Dr. Eberhard Desch, Federal Ministry of Justice,

Dr. S. Johannes Trommer, Embassy of the Federal Republic of Germany in the Netherlands,

Mr. Andreas Götze, Federal Foreign Office,

as Adviser;

Ms Fiona Sneddon,

as Assistant.

The Government of the United States of America is represented by:

Mr. James H. Thessin, Acting Legal Adviser, United States Department of State,

as Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

as Deputy Agents;

The Honourable Janet Napolitano, Attorney-General, State of Arizona,

Professor Michael J. Matheson, Professor of International Law, School of Advanced International Studies, Johns Hopkins University; former Acting Legal Adviser, United States Department of State,

Professor Theodor Meron, Counsellor on International Law, United States Department of State; Charles L. Denison Professor of International Law, New York University; Associate Member of the Institute of International Law,

Professor Stefan Trechsel, Professor of Criminal Law and Procedure, University of Zurich Faculty of Law,

as Counsel and Advocates;

Professor Shabtai Rosenne, Member of the Israel Bar; Honorary Member of the American Society of International Law; Member of the Institute of International Law,

Ms Norma B. Martens, Assistant Attorney-General, State of Arizona,

Mr. Paul J. McMurdie, Assistant Attorney-General, State of Arizona,

Mr. Robert J. Erickson, Principal Deputy Chief, Appellate Section, Criminal Division, United States Department of Justice,

Mr. Allen S. Weiner, Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

Ms Jessica R. Holmes, Attaché, Office of the Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

as Counsel.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et je donne la parole à M. Stephen Mathias.

Mr. MATHIAS:

5.1. Thank you, Mr. President. It is an honour to appear before this Court as a counsel for the United States in this case.

5.2. Mr. President, Members of the Court, my task this afternoon is to offer observations on the relief sought by Germany in this case. In its Memorial and again yesterday in its oral presentation, Germany has articulated four submissions, although those submissions changed somewhat in yesterday's version.

5.3. My observations will be limited to the first, second and fourth submissions. Professor Matheson will discuss the third submission, relating to the Court's Order on Provisional Measures.

Germany's first submission

5.4. Germany's first submission, and these submissions are provided in Tab 7 of the books in front of you, seeks a declaration by the Court

> **"that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, subparagraph 1 *(b)*, of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36, paragraph 1, of the said Convention".**

This submission includes five distinct elements: first, the allegation that the United States did not inform Karl and Walter LaGrand in a timely manner about their right of consular notification; second, the allegation that the United States deprived Germany of its right to provide consular assistance; third, the factual assertion that the execution of Karl and Walter LaGrand was the result of the foregoing alleged wrongful conduct; fourth, the allegation that the alleged wrongful conduct of the United States constituted a violation of an obligation to Germany in its own right; and finally, the allegation that the alleged wrongful conduct constituted a violation of an obligation to Germany in its right of diplomatic protection of its nationals.

5.5. As is clear from its Counter-Memorial, the United States has indicated that it would not object to a properly worded judgment of the Court with respect to two of these five elements: that the United States has admitted and apologized for a breach of its duty to inform Karl and Walter LaGrand of their right to notification of their consular officials and we do not dispute that this was a breach of an obligation owed to Germany under the Consular Convention.

5.6. But, the other three elements of Germany's first submission should be rejected. First there was no deprivation of Germany's right to provide consular assistance, under Article 5 or Article 36, to Karl or Walter LaGrand. From such time as Germany began to provide consular assistance to the LaGrands, there was no interference by the United States with such assistance, there has been no allegation by Germany of any such interference. Germany's attempt to transform a breach of one obligation into an additional breach of a wholly separate and distinct obligation should be rejected by the Court. It may be of rhetorical value but it is logically meaningless, for example, to assert that the United States interfered with communications between Germany and the LaGrands when neither sought to make any such communications.

5.7. Note that the communications between Germany and the LaGrands when they did take place were not the result of the United States informing the LaGrands of the possibility of such contact, but of the LaGrands learning independently of that possibility. So these distinct obligations do not walk hand-in-hand, and the violation of one does not constitute a breach of the other. Second, the request that the Court should incorporate into its judgment a factual finding that the execution of Karl and Walter LaGrand "ultimately resulted" from the breach of the duty to inform is not supported by the record before the Court. Attorney-General Napolitano addressed this issue this morning. Despite Germany's assurances to the contrary, the causation issue in this case presents a large hurdle for it to overcome. In his Third Report to the International Law Commission on State Responsibility, Professor James Crawford, the Special Rapporteur, observed with respect to this case and the *Breard* case:

> "the relationship between the breach of the obligation of consular notification and the conviction of the accused person was indirect and contingent. It could well have been the case that the subsequent trial was entirely proper and fair and that the failure of notification had no effect on the conviction. The United States had jurisdiction to try

> the accused for a capital offence, and was not a party to any instrument precluding the imposition of the death penalty."[1]

Germany's factual allegation on this point remains entirely speculative and should be rejected by the Court.

5.8. Finally, in so far as Germany seeks a determination by the Court that the breach of the duty to inform with respect to Karl and Walter LaGrand was a violation of an obligation to Germany in its right of diplomatic protection, Professor Meron has demonstrated that this issue is not properly before the Court.

Germany's Second Submission

5.9. This submission seeks a declaration by the Court

> "that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Consular Relations Convention, and by ultimately executing them, violated its international legal obligation to Germany under Article 36, paragraph 2, of the Convention to give full effect to the purposes for which the rights accorded under Article 36 of the Convention are intended".

5.10. We submit that this submission should be rejected by the Court in its entirety. It is premised on an interpretation of Article 36, paragraph 2, that is, as Ms Brown observed this morning, without support in the text of the Convention, in the preparatory work leading to the Convention, and in the practice of States that created the law that was codified by the Convention, in the practice of States after the coming into force of the Convention. The deficiency of this submission will be clearer, I think, if we look carefully at the relevant texts.

5.11. Article 36, paragraph 2, — and I think you have this before you in Tab 1 — provides that

> "[t]he rights referred to in paragraph 1 . . . shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended".

Thus, as counsel noted yesterday this Article has two parts: first, a proposition — concerning the manner in which the rights referred to in paragraph 1 are to be exercised — and, second, a proviso — which conditions the application of that proposition. Note that Germany's submission focuses exclusively on the second part, as if the proviso itself establishes a free-standing obligation, while ignoring the first part, the more fundamental proposition, which has to do with the exercise of rights referred to in paragraph 1.

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[1] A/CN.4/507/Add.1, para. 141.

5.12. Let us consider together the application of Article 36, paragraph 2, to Karl and Walter LaGrand. What were the rights referred to in paragraph 1 that the LaGrands were seeking to exercise? There are only three possibilities, all set out in subparagraph 1 *(b)*. First, they may be viewed as having had the right, at their request, to have the competent authorities of the United States inform the relevant German consular post without delay of their arrest or detention. Second, they may also be viewed as having had the right to have any communication addressed by them to the consular post forwarded by said authorities without delay. Third, for purposes of this argument, they may be viewed as seeking to exercise Germany's related right that its nationals be informed without delay of their right to consular notification.

5.13. Now, which of these rights — the only rights of the LaGrands set forth in paragraph 1, and, accordingly, the only rights that are the subject of paragraph 2 — which of these rights did the law of procedural default allegedly interfere with the exercise of? Did it interfere with the right of the LaGrands, at their request, to have German authorities informed of their arrest? No. By the time of the application of procedural default the LaGrands were in contact with German authorities. Similarly, there has been no allegation of any law or regulation that interfered with the exercise by the LaGrands of their right to have communications to the consular post forwarded without delay. Finally, there has been no allegation of any law or regulation that interfered with the LaGrands being informed, without delay, of their right to have German consular authorities notified of their detention. The breach of the duty to inform was the result of a mistake by the competent authorities of the State of Arizona, not the application of a law or regulation that limited the exercise of that duty. The explanation has been set out in detail in Exhibit 1 to the Counter-Memorial. Accordingly, with an eye toward the text of Article 36, paragraph 2, I would suggest, provisionally, that this section does not appear to be relevant to the LaGrand's exercise of any of their rights under paragraph 1.

5.14. Let us return now to Germany's submission. What is Germany's allegation on this point? Which of the rights referred to in paragraph 1 does Germany submit that the law of procedural default interfered with the exercise of? The answer is that Germany makes no such allegation with respect to any right referred to in paragraph 1. Germany submits, instead, that the United States, through the doctrine of procedural default, barred Karl and Walter LaGrand "from raising their claims under the Vienna Convention on Consular Relations". That is to say, Germany substitutes the concept of the making of a claim under the Vienna Convention for the concept of the exercise of the specific rights under Article 36, paragraph 1. This is a form of treaty interpretation for which there is no precedent in the Vienna Convention on the Law of Treaties or in international jurisprudence. The doctrine of effectiveness cannot and does not permit the transformation of one obligation into another where a carefully negotiated text clearly requires a different result. Germany has confused the exercise of a right with the remedy for the breach of an obligation.

5.15. There is a second aspect of Germany's second submission that is also difficult to reconcile with the text of Article 36, paragraph 2. Germany submits that the executions themselves violated the Consular Relations Convention. In light of both the Court's discussion of the capital punishment issue in paragraph 25 of the Order on Provisional Measures and the observations concerning the scope of Article 36, paragraph 2, already before the Court, we consider that this submission is clearly without merit. The laws and regulations pursuant to which the LaGrands were lawfully executed by the State of Arizona are not before this Court, because they have no application with respect to the attempted exercise by the LaGrands of any right under Article 36, paragraph 1.

5.16. Germany's argument, articulated for the first time yesterday, appears to be that States party to the Consular Convention undertook an obligation in Article 36, paragraph 2, to refrain from capital punishment with respect to foreign nationals who may have a "claim" under the Consular Relations Convention. The text of Article 36, paragraph 2, obviously does not support this conclusion. Germany implicitly acknowledges this by arguing for a rule of dynamic interpretation, by reference to developments in the human rights area. Professor Meron has already addressed the inadequacy of this argument as a proposed basis for the creation of a new obligation on States parties. For the Court to create such an obligation here would involve it not only in wholesale legislation but also in the inappropriate interference in the domestic law of the States parties.

Germany's fourth submission

5.17. Let us turn now to Germany's fourth submission. Germany's final submission — substantially rewritten for yesterday's presentation to include an additional element of relief — seeks the Court's determination

> "that the United States shall provide Germany an assurance that it will not repeat its illegal acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36."

5.18. I propose to discuss this fourth submission under two principal themes: first, the general character of the relief sought — assurances and guarantees of non-repetition — and their undetermined status under international law; and, second, the nature of the assurance sought in this case, and the inappropriateness of that assurance in the circumstances of this case. Much of our discussion will be framed in terms of the International Law Commission's draft articles provisionally adopted by the Drafting Committee of the Commission on second reading. We note, however, that the draft articles on State responsibility remain, by their very terms, unfinished and that the Commission's own practice in substantially revising earlier versions of these draft articles should caution against treating the current draft as definitive. We also note that States provided substantial comments during this year's consideration of the Report by the Sixth Committee of the General Assembly. We note further that written comments by member States have been requested by 31 January 2001. The United States intends to provide comments on a variety of provisions, including the provision on assurances and guarantees of non-repetition.

5.19. We suggest that the Court should also bear in mind the dual mandate of the International Law Commission. While it may be entirely appropriate for the International Law Commission, in fulfilment of its mandate for the progressive development of international law, to identify obligations that may not be reflections of current law, it would not be appropriate for this Court to impose such an obligation on a State appearing before it that has not accepted such an obligation. I note in this regard that a number of States in the recent Sixth Committee discussion of the draft articles noted that the draft articles included significant aspects that reflect progressive development and not codification of customary law.

5.20. Germany's fourth submission is clearly of a wholly different nature than its first three submissions. Each of the first three submissions seeks a judgment and declaration by the Court that a violation of a stated international legal obligation has occurred. Such judgments are at the core of the Court's function, as an aspect of reparation.

5.21. These were discussed yesterday as a form of satisfaction. There is ample precedent for this approach, including this Court's important Judgment in the *Corfu Channel* case that "the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction"[2]. The 1990 Award of the arbitral tribunal in the *Rainbow Warrior* case is to similar effect:

> "that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand"[3].

The recent decision in the *Saiga No. 2.* case, before the International Tribunal for the Law of the Sea provides additional illustration on this point[4].

5.22. Article 38 of the International Law Commission's draft articles on State responsibility provides in paragraph 2, as was noted yesterday, that "Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or other appropriate modality."[5] Counsel for Germany yesterday mocked these elements of satisfaction, but their contempt does not find support in the law. The acknowledgment of breach and formal apology are at the heart of the law of satisfaction: and we anticipate that this Court, like the International Law Commission, will not be so dismissive.

5.23. In contrast, however, to the character of the relief sought in the first three submissions, the requirement of assurances of non-repetition sought in the fourth submission has no precedent in the jurisprudence of this Court and would exceed the Court's jurisdiction and authority in this case. It is exceptional even as a non-legal undertaking in State practice, and it would be entirely inappropriate for the Court to require such assurances with respect to the duty to inform undertaken in the Consular Convention in the other circumstances of this case.

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[2] *I.C.J. Reports 1949*, p. 4.

[3] *20 UNRIAA*, p. 275.

[4] *Judgment of 1 July 1999, 38 ILM*, p. 1233 (English texts only) at paras. 176, 183 (7), (8) and (9).

[5] A/55/10 at p. 133.

5.24. The special status of assurances and guarantees of non-repetition was acknowledged by the Special Rapporteur, Professor Crawford, in his Third Report on State Responsibility, where he notes that

> "the question is not one of reparation but, as it were, a reinforcement of an (*ex hypothesi* continuing) legal relationship. In this sense assurances and guarantees relate to future performance of the obligation, on the footing that it has survived the breach."[6]

An assurance or guarantee requires the creation of a new obligation with independent legal significance; the Commission's Report records the observation that "[f]rom a legal standpoint, the fact that such a guarantee had been given would be a new undertaking over and above the initial undertaking that had been breached"[7]. Learned counsel yesterday suggested that assurances be regarded both as a form of satisfaction and as a future-oriented obligation unrelated to reparation. With respect, we submit that, while it may fit better conceptually where the Commission has currently placed it, it is not part of customary law in circumstances like those in this case under either conceptual basis.

5.25. As was argued in the Counter-Memorial, the Court should reject Germany's invitation to confer upon Germany new or additional rights beyond those existing under the Consular Convention. The Court's power to decide cases in its role as the principal judicial organ of the United Nations does not extend to the power to order a State to provide a "guarantee" intended to confer additional legal rights; that is, does not extend to legislation. Professor Rosenne has written definitely on this point:

> "The International Court is not a legislative body established to formulate new rules of law. In a sense this is stating the obvious. Nevertheless, confusion persists. The Court, like all courts, applies the existing law. It does not 'create' new rules of law for the parties to a given dispute or for the international community at large."[8]

5.26. Moreover, the Court has never issued a judgment requiring assurances or guarantees of non-repetition or any other specific action in anticipation of a violation of international law. In fact, in *Haya de la Torre*, the Court did the opposite. In that case, the Court was asked to determine the manner in which effect should be given to its earlier declaratory Judgment in the *Asylum* case. In *Haya de la Torre*, the Court held that it was not in a position to state how Colombia should terminate the asylum it had granted. The Court held:

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[6] A/CN.4/507, para. 54.

[7] A/55/10, para. 87.

[8] *The World Court. What It Is and How It Works*, 5th ed., p. 38.

> "Having thus defined in accordance with the Havana Convention the legal relations between the Parties with regard to the matters referred to it, the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view toward terminating the asylum, since, by doing so, it would depart from its judicial function."[9]

5.27. In addition to the question of the Court's authority, as a general matter, to order such a guarantee, there is the need to consider the basis for the Court's jurisdiction to do so in this particular case. The Optional Protocol provides the Court with jurisdiction to decide disputes arising out of the interpretation or application of the Vienna Convention. The alleged entitlement of Germany to an assurance or guarantee of non-repetition does not arise out of a dispute concerning the interpretation or application of the Vienna Convention. If there is such an entitlement, it arises under general international law, not the Vienna Convention. It is clear in the Court's jurisprudence that, when the Court has jurisdiction under the Optional Protocol, that jurisdiction includes such matters as the cessation of wrongful conduct and the reparation for such conduct. What is unprecedented is the suggestion that such jurisdiction would extend so far as the requirement of a new legal undertaking that would be "over and above" — to return to the language of the International Law Commission's Report — "over and above" the Convention obligation that is the basis for the Court's jurisdiction under the Optional Protocol. Such a requirement is a significant conceptual leap from the application and interpretation of the Consular Convention. By its very nature, it is independent of the application and interpretation of the Convention. We believe that it would undermine the fundamental notion of the consent-based jurisdiction of the Court were the Court, in the context of adjudicating a dispute arising out of the interpretation or application of the Consular Convention, to impose a new, independent legal obligation on the United States allegedly arising from the law of State responsibility.

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[9] *I.C.J Reports 1951*, p. 83.

5.28. The record of the Commission's discussion of assurances and guarantees of non-repetition reveals fundamental scepticism about whether there is any legal obligation to provide them. Thus, it was observed that, while in daily diplomatic practice governments often provided such assurances, it was considered questionable whether such a statement could be regarded as a legal consequence of responsibility[10]. It was remarked that there were no examples of cases in which the courts had required assurances and guarantees of non-repetition[11]. The place of assurances and guarantees of non-repetition was questioned since they seemed directly inherited from nineteenth-century diplomacy[12]. In his Third Report, Special Rapporteur Crawford questioned whether assurances and guarantees:

> "can properly be formulated as an obligation at all. It may be asked what the consequences of a breach of that obligation could be. For example, could a State which had tendered full reparation for a breach be liable for countermeasures because of its failure to give assurances and guarantees against repetition satisfactory to the injured State? It does not seem very likely."[13]

5.29. While the Special Rapporteur noted that a few governments had commented on the subject and had generally been supportive of assurances and guarantees, he added that "this does not mean however that they share the same view as to its scope and purpose"[14]. In fact, the comments by governments do not appear to provide any particular support for the requirement of an assurance or a guarantee of non-repetition in the context of this case.

5.30. Most significantly, Germany itself has questioned the status of guarantees of non-repetition as an obligation following from State responsibility. In its comments in 1997 on the draft articles, Germany observed that

> "[s]ome doubt exists, however, as to whether the injured State has, under customary international law, the right to 'guarantees of non-repetition'... To impose an obligation to guarantee non-repetition in all cases would certainly go beyond what State practice deems to be appropriate."[15]

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[10] A/55/10, para. 88.

[11] *Id.*

[12] *Id.*

[13] A/CN.4/507, para. 58.

[14] *Id.*, para. 56.

[15] A/CN.4/488, para. 104.

We note that in its original submission Germany had requested just such a guarantee. Yesterday, there was a change in the submission. Now Germany seeks an assurance, but an assurance that amounts to an absolute guarantee of non-repetition. There is some question of the appropriateness of Germany asking the Court to require from the United States an undertaking which, it has conceded, is without firm support in customary international law.

5.31. The current version of the draft article on cessation and non-repetition appears at Article 30, which states in relevant part that: "The State responsible for the internationally wrongful act is under an obligation . . . *(b)* to offer appropriate assurances and guarantees of non-repetition, if circumstances so require"[16]. Note carefully the calculated imprecision of that draft article: not only is it clear from the draft article that the obligation is to offer "appropriate" assurances and guarantees, not, as Germany would seem to require, an absolute assurance that the United States will not repeat its allegedly wrongful acts, but it is also clear that such an obligation does not exist in all cases, but only "if circumstances so require". The report of the Drafting Committee on Article 30 is replete with cautionary notes. It records that "[s]everal members had pointed out that assurances and guarantees of non-repetition were not appropriate in all circumstances"[17]. The Report continues: "They were measures for exceptional circumstances. That was what the words 'if circumstances so require' at the end of subparagraph *(b)* were intended to convey."[18]

5.32. With these observations on the exceptional nature of appropriate assurances and guarantees as a backdrop, let us consider more carefully the specific request that Germany is making in this case. First, Germany asks the Court to declare that the United States shall provide Germany with an assurance that it will not repeat its illegal acts. Illegal acts, in the plural. This, presumably, although not expressly, is a reference back to the first three submissions.

5.33. Let us consider the German request for an assurance as to the duty to inform foreign nationals without delay of their right to consular notification. Note that the German request is not phrased in terms of an obligation on the part of the United States to undertake to take steps, for example, to improve its performance of consular notification duty in the future. Such assurances were treated with contempt yesterday in this courtroom. It instead seeks to have the Court require the United States to assure that it will never again fail to inform a German foreign national of his or her right to consular notification. But the Court is aware that the United States is not in a position to provide such an assurance. This observation does not reflect a lack of concern by the United States with respect to its international obligations. It reflects the reality against which the German request for an additional assurance of non-repetition should be evaluated. I would, with respect, ask the distinguished Members of the Court whether they think that their own countries could provide such an assurance.

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[16] A/55/10, para. 131.

[17] A/CN.4/SR.2662 , para. 6.

[18] *Id.*

5.34. It is true, as counsel for Germany has observed, that the likelihood of repetition of a wrongful act has been identified in the reports of the International Law Commission as a factor that may be relevant to the determination of the circumstances, if any, in which the law of State responsibility would require an offer of appropriate assurances or guarantees of non-repetition[19].

5.35. It is not necessary for the Court to determine in this case, however, whether the law of State responsibility would require the United States to offer appropriate assurances of some character to Germany with respect to the obligation of consular notification because, as the Court is aware, the United States has already provided appropriate assurances to Germany on this point. The Court has heard a good deal about these very substantial efforts already today.

5.36. The nature of the assurances that the United States has provided is consistent with State practice, which includes a range of undertakings. The International Law Commission has been clear that assurances and guarantees may take a variety of forms. The Commentary on the draft articles as adopted at first reading observed that "international practice is not univocal" with regard to the kind of guarantees that may be requested[20]. The Report of the Commission's 52nd Session records the observation of the Special Rapporteur that "sufficient assurances and guarantees could range from extraordinarily rigorous arrangements to mere promises or undertakings in different cases"[21]. The Report of the Drafting Committee suggests that "[a]ssurances were normally given verbally, while guarantees of non-repetition involve something else, i.e., certain preventive actions"[22]. While the first part of this observation may not apply in the current case, in which assurances were provided in writing, the diplomatic Note that is before the Court, the notion that assurances or guarantees may involve "certain preventive actions" is certainly consistent with the four-and-one-half pages of preventive actions that are described in the Note of 18 February 2000.

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[19] See, e.g., A/55/10 at para. 91.

[20] A/CN.4/SER.A/1993/Add.1 (Part 2) at 82. [Replace with official cite.]

[21] A/55/10 at para. 77.

5.37. Germany's request for a judgment requiring an absolute assurance of non-repetition, on the other hand, is without precedent and misguided in respect of an obligation like the one at issue in this case. While the Commentary cites, and Germany has cited, certain incidents, mainly from the nineteenth century, in which States have requested such an absolute guarantee from other States, no case has been cited in which any court or tribunal — outside, perhaps, the special circumstances of human rights law — has ever ordered such an assurance. In addition, none of those incidents involved an obligation of the nature of the consular notification obligation, one that is to be performed on a continuing basis, by officials at all different levels of government, throughout the territory of the State, in countless circumstances. It may be one thing for a State to seek an absolute assurance that a particular consular post will be better protected in the future. It is another to seek the sort of assurance that is here sought by Germany. Moreover, the Commentary specifically observed, with respect to some of the incidents it cited, that "[t]hese examples would not necessarily all represent what would be 'appropriate' by today's standards"[23]. To the same effect is the caution of the Drafting Committee in its discussion of Article 30:

> "The Drafting Committee had been fully aware that, in the past, guarantees of non-repetition had involved demands that were far-reaching, but it had taken the view that guarantees could not be dropped from the articles simply because some demands had been excessive. It might be reasonable, in some exceptional circumstances, to say that verbal assurances were inadequate."[24]

But Germany's request here goes far beyond a "reasonable" request for a written statement of preventive measures.

5.38. It is true that the obligations undertaken by the United States and the other States party to the Consular Convention are themselves stated in absolute terms. Germany argues that all it seeks is a requirement that the United States honour its international obligations. But Ms Brown has discussed the practice of States in implementing their obligations under the Convention, she elaborated on the "conversation" among States that informs the implementation of the Convention. A guarantee of the sort sought by Germany is not part of that "conversation" and it is not consistent with the practice of States in implementing the Convention. Moreover, as previously stated, the request for a guarantee is a request for the undertaking of a new obligation, "over and above" — again in the words of the International Law Commission — the existing obligation. There is no basis in international law or practice for such a new undertaking in the circumstances of this case. It might be noted that the record suggests that Germany itself would not be in a position to provide such an assurance.

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[22] A/CN.4/SR.2662 at 6.

[23] A/CN.4/SER.A/1993/Add.1 (Part 2) at 326. [Replace with official cite.]

[24] A/CN.4/SR.2662 at 6-7.

5.39. The rationale of the US position with respect to assurances is different with respect to the other allegedly wrongful acts, that are the subject of Germany's submissions. Any requirement of assurances or guarantees with respect to the alleged interference of the United States with German provision of consular assistance to its nationals would be entirely inappropriate, because no such interference has taken place in the first instance. There has been no breach and no likelihood of a future breach has been established. Where there has been no breach, of course, the possibility of an aggravated breach, as suggested by counsel yesterday, also does not arise.

5.40. With respect to the alleged breach of Article 36, paragraph 2, Germany's fourth submission is more precise. Germany seeks an assurance that, "in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36".

5.41. Let us look closely at that requested assurance. First, it is again absolute in character. We have already discussed the inappropriateness of such an assurance in circumstances like these. Second, it seeks to create obligations on the United States that exceed those that are contained in the Vienna Convention. For example, the requirement of consular notification under Article 36, paragraph 1 *(b)*, of the Convention applies when a foreign national is arrested, committed to prison or to custody pending trial or detained in any other manner. It does not apply, as the submission would have it, to any future criminal proceedings. That is a new obligation, and it does not arise out of the Vienna Convention. A second example is the reference in the submission to the "law and practice" of the United States. With apologies for trying the Court's patience on the precise terms of Article 36, paragraph 2, of the Convention, the relevant phrase in the text is the "laws and regulations" of the receiving State. Again, Germany seeks to have the Court impose a different obligation on the United States than the obligation that it has assumed in acceding to the Consular Convention. Moreover, it seeks the requirement of such an assurance in a context in which no breach of the relevant obligation has been proved.

5.42. More broadly, Germany's fourth submission raises the prospect of the Court's being invited by Germany to go beyond the resolution of the international legal dispute between the United States and Germany that is before it. Even if this Court were to agree that, as a result of the application of procedural default with respect to the claims of the LaGrands, the United States committed a second internationally wrongful act, it should limit that judgment to the application of that law in the particular case of the LaGrands. It should resist the invitation to require an absolute assurance as to the application of US domestic law in all such future cases. The imposition of such an additional obligation on the United States would, as previously discussed, be unprecedented in international jurisprudence and would exceed the Court's authority and jurisdiction.

5.43. There remains only the new element of relief submitted yesterday for the first time that: "[I]n particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36." My comments with respect to the previous section of the fourth submission hold true for this part of the submission as well, but I would like to make two additional, very brief points. First, there is no obligation in the Consular Convention that is limited to capital cases. To the extent that Germany seeks such relief, it is self-evident that the source of such an obligation must be other than the Consular Convention. But the Court is well aware that its jurisdiction is limited to the Consular Convention in this case. Second, as Attorney-General Napolitano described, there are, in fact, remedies available under United States law where criminal convictions do not meet appropriate standards, which could include cases in which a breach of the duty to inform a foreign national of his or her right to consular notification may have been involved.

5.44. Mr. President, Members of the Court, I thank you for your attention. Mr. President, I ask that you now call on Professor Trechsel.

Le PRESIDENT : Je vous remercie beaucoup, Monsieur Mathias, et je donne maintenant la parole au professeur Trechsel.

M. TRECHSEL :

6.1. Monsieur le président, Madame et Messieurs les juges, chers confrères, Mesdames et Messieurs, je considère cette occasion qui m'est offerte de vous adresser la parole comme un honneur exceptionnel. De même que le procureur général Napolitano, je me sens un peu comme une plante exotique dans cette impressionnante salle. Ici, ce sont normalement les grands spécialistes du droit international public qui se confrontent. Pour une fois, vous êtes invités à écouter un pénaliste relié au droit des gens par un seul pont : les droits de l'homme.

6.2. Malgré le fait que les Etats-Unis sont de l'avis que cette affaire ne concerne en aucune manière les droits de l'homme mais est limitée strictement à l'interprétation de l'article 36 de la convention de Vienne sur les relations consulaires, nous pensons que nous devons présenter à votre Cour nos vues concernant l'aspect «droits de l'homme» (et nous utiliserons comme synonyme le terme «droits fondamentaux»), vu que nos adversaires ont introduit cet aspect dans leurs plaidoiries.

6.3. Qu'il me soit permis, Monsieur le président — et mes clients me le permettent — de commencer mon intervention par une déclaration à caractère général et personnel (mais je sais que d'autres membres de notre équipe partagent mon point de vue) : la présente affaire ne concerne pas le problème de la peine capitale. Néanmoins, la toile de fond est constituée par le triste sort des frères LaGrand, qui ont tous deux été exécutés. On pourrait être tenté de voir dans la plainte allemande une démarche pour la vie, à laquelle s'opposeraient les Etats-Unis. Nous sommes tous, dans cette salle, unanimes pour rejeter une pareille perspective. Néanmoins, pour dissiper tout malentendu possible, je tiens à préciser de façon énergique et catégorique que j'ai toujours été, je suis et je resterai toujours un fervent adversaire de la peine de mort. S'il s'agissait aujourd'hui de la défendre, je ne serais très certainement pas de la partie.

6.4. Ceci dit, je propose de vous entretenir de trois aspects de cette affaire. Je pars de l'idée que l'article 36, paragraphe 1 *b)* de la convention de Vienne sur les relations consulaires accorde effectivement un droit, tout au moins un droit à caractère dérivé, à l'étranger qui est arrêté dans un pays ayant ratifié, de même que son pays d'origine, cette convention. Les trois questions que j'aborderai sont les suivantes :

1. Ce droit peut-il être considéré comme appartenant à la catégorie des droits de l'homme ?
2. Mis à part la qualification du droit à l'«information consulaire», s'agit-il d'un droit de la défense faisant partie du droit à un procès équitable ?
3. Dans l'affirmative *(quod non)*, quelles peuvent être et ne pas être les conséquences d'une violation de ce droit ?

6.5. Une dernière observation préliminaire : la tâche de cette Haute Cour est de dire le droit, de dire le droit tel qu'il est aujourd'hui. Peut-être pourrait-il paraître souhaitable d'ajouter des garanties supplémentaires à ce qui est aujourd'hui considéré comme appartenant au domaine des droits de l'homme, et notamment du droit à un procès équitable. Pareille entreprise n'est cependant pas du domaine de votre juridiction. D'ailleurs, on peut observer aujourd'hui — et j'y reviendrai — une véritable inflation dans le domaine des droits de l'homme, inflation qui risque de dévaluer la monnaie plutôt que de renforcer le droit. N'oublions pas, par exemple, que les victimes de crime revendiquent désormais des droits dans la procédure pénale, revendication qui n'est pas dépourvue de légitimité. Enfin, un plus en quantité ne signifie pas nécessairement un plus en qualité.

Je vais maintenant aborder le premier volet de mon intervention.

1. Le droit d'être informé de la possibilité du contact consulaire fait-il partie des droits de l'homme ?

6.6. C'est ce que l'Allemagne soutient et la cour interaméricaine est du même avis. D'abord, elle constate que l'article 36 de la convention de Vienne donne certains droits au détenu étranger, droits qui sont la contrepartie des obligations de l'Etat de résidence[25]. Par la suite, elle constate que si l'Etat d'envoi le désire, il peut assister le détenu par plusieurs mesures concernant sa défense ce qui l'amène déjà à répondre par l'affirmative à la question de savoir si le droit concerne la protection des droits de l'homme[26]. Notons que la cour se réfère à l'article 64 de la convention interaméricaine qui définit sa compétence. La cour ne dit donc pas *expressis verbis* que l'article 36 de la convention consulaire fait partie des droits de l'homme. Or, il nous semble que finalement elle en arrive pratiquement là tout de même, ce qui vaut aussi pour la position allemande telle que nous l'avons entendue hier. Nous allons démontrer que ce résultat ne peut guère être applaudi.

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[25] Par. 84: *"Por lo tanto, la Corte concluye que el articulo 36 de la Convención de Viena sobre Relaciones Consulares reconoce al detenido extranjero derechos individuales a los que corresponden los deberes correlativos a cargo del Estado receptor" ("The Court therefore concludes that Article 36 of the Vienna Convention on Consular Relations endows a detained foreign national with individual rights that are the counterpart to the host State's correlative duties").*

6.7. Afin de savoir si le droit de l'étranger arrêté à être informé de son droit de demander que le poste consulaire de l'Etat d'envoi soit averti de son arrestation peut être considéré comme tombant dans la catégorie des «droits de l'homme», il convient en premier lieu de définir ce que sont les droits de l'homme.

6.8. Il serait séduisant de répondre par une considération positiviste. Elle amènerait à la conclusion qu'aucun traité international, aucune convention, aucun pacte, aucune résolution sur les droits de l'homme ne fait mention de ce droit. En effet, lorsque l'on consulte les listes de sources des droits de l'homme établies par les champions de la recherche scientifique, c'est le néant. Aucune mention dans la liste officielle établie par les Nations Unies[27], ni dans la le catalogue de plus de soixante-douze documents établi périodiquement par Jean-Bernard Marie[28], rien dans le volume impressionnant de Rebecca Wallace[29] ni chez Nigel Rodley[30], dans Robertson et Merrills[31], Steiner et Alston[32] ou Zaffaroni[33]. Non seulement la convention de Vienne n'est-elle pas conçue officiellement comme un texte garantissant des droits de l'homme, mais la communauté académique ne lui attribue pas cette qualité non plus.

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[26] Par. 85 : *"Ahora bien, es necesario examinar si las obligaciones y derechos consagrados en dicho artículo 36 conciernen a laprotección de los derechos humanos" ("The Court must now consider whether the obligations and rights recognized in Article 36 of the Vienna Convention on Consular Relations concern the protection of human rights")*; par. 87 : *"Por lo tanto, la comunicación consular a la que se refiere el artículo 36 de la Convención de Viena sobre Relaciones Consulares, efectivamente concierne a la protección de los derechos del nacional del Estado que envía y puede redundar en beneficio de aquel. Esta es la interpretación que debe darse a las funciones de 'protección de los intereses" de dicho nacional y a la posibilidad de que éste reciba "ayuda y asistencia", en particular, en la organización de "su defensa ante los tribunales"" ("Therefore, the consular communication to which Article 36 of the Vienna Convention on Consular [Relations refers] does indeed concern the protection of the rights of the national of the sending State and may be of benefit to him. This is the proper interpretation of the functions of 'protecting the interests' of that national and the possibility of his receiving 'help and assistance,' particularly with arranging appropriate 'representation . . . before the tribunals'")*.

[27] *Center for Human Rights, Geneva, Human Rights: A Compilation of International Instruments, Sales* Nos. E.94.XIV.1 et E.97.XIV.1.

[28] Voir pour la liste la plus récente : Jean-Bernard Marie, *"International instruments relating to human rights, classification and status of ratification as of 1 January 2000"*, *in Human Rights Law Journal* 21 (2000) p. 91 et suiv.

[29] Rebecca Wallace, *International Human Rights, Texts and Materials*, London, 1997.

[30] Nigel Rodley, *The Treatment of Prisoners under International Law*, 2nd. ed., Oxford, 1999, qui se réfère aux conventions de Vienne dans le contexte de l'affaire des *Otages* de Téhéran, affirmant que la Cour internationale n'a pas tranché en s'appuyant sur ces textes.

[31] A.H. Robertson and J.G. Merrills, *Human Rights in the World*, Manchester/New York, 1996.

[32] Henry Steiner and Philip Alston, *International Human Rights in Context*, Oxford, 1996.

6.9. Il est vrai que la résolution de 1985 de l'Assemblée générale de l'Organisation des Nations Unies sur les droits des étrangers[34] mentionne le droit au contact consulaire. Or, mis à part le fait que cette résolution peut tout au plus être considérée comme du «droit mou» comme du *"soft law"*, ce que l'Allemagne reconnaît[35], la résolution ne mentionne pas le droit à être informé. Hier, mon éminent et estimé collègue M. le professeur Simma a affirmé le contraire — mais il me semble que c'était plutôt un exercice en fantaisie constructif.

6.10. Mais je n'ai aucunement l'intention d'en rester là. En fait, et à juste titre, le positivisme n'est pas en vogue dans le domaine des droits de l'homme.

6.11. Nous devons donc rechercher un critère de substance pour distinguer les droits de l'homme d'autres droits. Ce critère me semble évident : les droits de l'homme sont des droits fondamentaux dont doivent bénéficier tous les êtres humains du fait même de leur existence humaine. «Tous sont nés égaux», c'est là l'idée qui est à la base de cette catégorie de droits. Il est vrai que certains instruments se réfèrent à des catégories bien définies d'êtres humains, telles les femmes[36] et les enfants[37]. Mais il s'agit là de catégories générales et, si vous voulez, «naturelles» à l'espèce humaine. Et c'est toujours la qualité primaire d'«être humain» qui est décisive.

6.12. Or, c'est justement cette généralité qui fait défaut dans le domaine du droit de la convention de Vienne. Il ne s'agit pas d'une garantie formulée dans des termes comme : «Chacun a le droit à...» ou «Le droit de toute personne à...» Il ne s'agit même pas, et cela me paraît assez significatif, d'un droit de «tout étranger». Je reviendrai sur cet aspect à l'instant.

6.13. Les droits de l'homme ne sont pas conférés à leurs bénéficiaires, ils sont innés, et sont simplement «reconnus» par les traités internationaux. Par contre, le droit d'un étranger à l'information sur son droit au contact consulaire a son origine uniquement soit dans la convention

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[33] Eugenio Raoul Zaffaroni (ed.), *Sistemas penales y derechos humanos en América Latina*, Buenos Aires, 1986.

[34] *"Declaration on the Human Rights of individuals who are not nationals of the Country in which they live, GA Resn 40/144, G.A.O.R., 40th Sessn., supp. 52*, p. 253, *adopted by consensus in 1985"*

[35] Mémoire, par. 4.110.

[36] Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes du 18 décembre 1979.

[37] Convention des Nations Unies relative aux droits de l'enfant, adoptée par l'Assemblée générale des Nations Unies le 20 novembre 1989.

de Vienne, soit dans un traité bilatéral sur les relations consulaires. Les Hautes Parties contractantes à pareille convention confèrent mutuellement ce droit à leurs ressortissants respectifs.

6.14. Je ne parle pas du fait, banal, que l'étranger qui est arrêté dans un pays qui n'a pas ratifié la convention de Vienne ou un traité analogue ne jouira pas de ce droit. La même observation pourrait être faite par rapport aux instruments protégeant les droits de l'homme. Je parle du ressortissant d'un pays qui n'a pas adhéré à la convention et qui est arrêté dans un pays partie à cette convention de Vienne. Pour donner un exemple concret : imaginons un ressortissant du Belize, pays qui n'a pas ratifié, arrêté au Mexique en même temps que son ami guatémaltèque. Alors que ce dernier devra être informé, aucune obligation analogue n'existe à l'égard du Bélizien. Par contre, les droits de l'homme garantis par un traité international seront accordés à toute personne se trouvant sous la juridiction d'un Etat qui a ratifié ce traité.

6.15. Il va également sans dire que le principe de réciprocité est central en la matière de droit consulaire, alors qu'il est tout à fait étranger aux droits des droits de l'homme, ce que la Commission européenne des droits de l'homme a déjà exprimé clairement dans l'affaire Autriche contre Italie[38].

6.16. Une caractéristique essentielle des droits de l'homme est qu'ils doivent être respectés sans aucune discrimination, notamment en raison de la nationalité d'une personne. Or, la convention de Vienne octroie des droits exclusivement aux ressortissants des Etats parties. Les ressortissants du pays procédant à l'arrestation et les ressortissants de pays n'ayant pas ratifié la convention restent automatiquement exclus.

6.17. Changeons d'hypothèse : le droit à l'information garanti par la convention de Vienne constitue-t-il, comme l'Allemagne l'affirme, une mesure nécessaire pour compenser la position d'infériorité dans laquelle se trouve un étranger lorsqu'il est arrêté ? C'est par ce biais que le droit en question pourrait effectivement acquérir le statut d'un droit fondamental. Nous ne rejetons pas la thèse selon laquelle un besoin de ce genre puisse surgir. Mais nous soulignons tout d'abord que, dans le cas des frères LaGrand — et la présente affaire se limite strictement à ce cas — il est impossible d'identifier un besoin de ce genre. En effet, ces hommes se considéraient eux-mêmes comme des Américains. Il n'est pas nécessaire de revenir sur tout ce qu'a dit le procureur général Napolitano à ce sujet.

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[38] Commission européenne des droits de l'homme, requête n° 788/61, rapport du 23 octobre 1963, *Annuaire de la Convention européenne des droits de l'homme* VI, p. 714 et suiv., par. 56 et suiv.

6.18. Mais l'argument n'est même pas convaincant sur le plan général. En effet, les difficultés typiques et particulières auxquelles un étranger peut faire face se rapportent à la langue étrangère et au fait qu'il connaît mal ou pas du tout le système juridique du pays dans lequel il a été arrêté. Or, la convention de Vienne ne fait référence ni à l'une ni à l'autre de ces conditions. En effet, il se peut très bien qu'il n'y ait aucun problème de ce genre dans un cas particulier. La convention s'applique même là où l'étranger provient d'un pays qui a la même langue que le pays de résidence et un système juridique semblable. Pensons, par exemple, à un Australien arrêté au Royaume-Uni, un Français en Belgique, un Allemand en Autriche, sans parler, évidemment, des immigrés de la deuxième génération, qui ont vécu toute leur vie dans le pays de résidence mais qui restent peut-être des étrangers quand même.

6.19. Mais il y a plus, et ceci sous deux angles : d'une part, en règle générale, l'étranger bénéficie déjà d'une protection suffisante, d'autre part je ne vois pas sur quelle base on pourrait raisonnablement soutenir que la convention de Vienne lui accorde effectivement un droit à quelque assistance que ce soit.

6.20. D'abord, la protection existante : toute personne arrêtée a le droit d'être informée aussitôt, et *dans une langue qu'elle comprend*, des raisons de son arrestation en vertu des instruments internationaux — et je pense que le libellé vous est tout à fait familier parce que je cite[39]. Au cas où ces personnes se trouveraient confrontées à une accusation en matière pénale, elles ont le droit de nouveau à être informée de cette accusation dans une langue qu'elle comprend[40]. En plus, la personne profite des services gratuits d'un interprète[41]. Enfin, elle aura le droit de se faire assister par un avocat de son choix ou, si elle n'en a pas les moyens de le rémunérer, le droit à l'assistance judiciaire[42]. Cet avocat connaîtra le système juridique du pays. Nous reconnaissons que l'avocat commis d'office ne sera peut-être pas toujours le meilleur.

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[39] Voir articles 9, par. 2 du Pacte des Nations Unies et 5, par. 2 de la convention européenne.

[40] Voir paragraphe 3 *a)* des articles 14 du Pacte et 6 de la convention européenne.

[41] Voir articles 14 par. 3 *f)* du Pacte et article 6 par. 3 *e)* de la convention européenne.

[42] Voir articles 14 par. 3 *d)* du Pacte et 6 par. 3 *c)* de la convention européenne.

Souvent ce sera d'ailleurs aussi le cas pour l'avocat choisi, et le même problème se pose pour tous les accusés indigents indigènes. D'autre part, excluant les bagatelles, le fait que l'accusé est un étranger est justement un des critères pris en considération pour savoir si les intérêts de la justice nécessitent l'assistance judiciaire[43]. La lacune que l'article 36 de la convention de Vienne prétend combler n'existe donc pas. Si notre distingué confrère, M. Kaul a dit hier que sans information consulaire il n'y avait pas de droits de la défense, il s'agit là de plus que d'une simple exagération.

6.21. Ensuite : quelle est la valeur du droit conféré à l'étranger en vertu de la convention de Vienne ? S'agit-il là d'un droit à quelque assistance que ce soit ? La réponse doit être négative, quoi que puisse soutenir l'Allemagne. Le droit à l'information de la personne arrêtée sur la possibilité de contacter les autorités consulaires de son pays d'origine n'a qu'un caractère auxiliaire et accessoire. Il doit faciliter une prise de contact si la personne concernée le désire. Ce ne sera pas toujours le cas et la convention tient même compte de cette éventualité dans la mesure où elle ne prévoit pas l'information automatique du consulat en question.

6.22. Toute une série d'hypothèses est interposée entre l'information et une assistance effective :

a) la personne arrêtée doit exprimer le désir de contacter le consulat;

b) le consulat doit réagir. La convention de Vienne, il est vrai, lui donne ce droit et privilégie ces contacts. Mais le consulat doit être disposé et en mesure d'accorder une assistance au détenu. Ce ne sera pas toujours le cas;

c) l'assistance éventuellement fournie doit effectivement être utile à la défense. A ce propos nous trouvons un exemple, qui a déjà été mentionné, un exemple d'une ironie tragique dans le mémoire même de l'Allemagne : elle donne l'exemple de l'affaire Apelt, où elle a eu la possibilité de prêter cette assistance qu'elle n'a pas pu fournir aux frères LaGrand. Or, nous savons que les frères Apelt se trouvent actuellement au couloir de la mort, le *death row* d'une prison en Arizona. Je me dispense de tout commentaire quant à l'effectivité de cette assistance;

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[43] Cour européenne des droits de l'homme, arrêt Quaranta contre Suisse du 24 juin 1991, *série A n° 205*, par. 35; Harris/O'Boyle/Warbrick, p. 262.

6.23. Notre analyse démontre que le droit à être informé du droit d'entrer en contact avec le poste consulaire revêt un caractère purement auxiliaire. Le poste consulaire n'a, d'après la convention de Vienne, aucune obligation de prêter assistance et, en contrepartie, le requérant, la personne arrêtée, n'a aucun droit à une assistance de la part du poste. En ceci, ce droit se distingue très nettement du droit à l'assistance judiciaire, qui doit être effective, et d'autres droits fondamentaux. Il n'est pas exclu qu'un droit lui soit conféré par son droit national, mais cela ne peut vraiment pas intéresser la Cour internationale de Justice. Il nous paraît très recherché, pour ne pas dire aberrant, de construire un droit fondamental sur la base de ces possibilités qui sont entièrement facultatives. Aujourd'hui nous nous trouvons confrontés à un véritable danger d'inflation des droits de l'homme[44]. Certes, l'extension de leur portée est souvent signe de bonne volonté, mais la multiplicité d'instruments et de voies de recours prête déjà à confusion et risque, en fin de compte, d'affaiblir le caractère effectif de ces garanties.

6.24. Afin d'éviter tout malentendu : nous n'avons aucunement l'intention de réduire en bagatelle le droit que confère le paragraphe 1 *b)* de l'article 36, dernière phrase de la convention de Vienne. Mais nous contestons catégoriquement la thèse selon laquelle il s'agit là d'un droit fondamental appartenant à la catégorie des «droits de l'homme». Et je vous prie de citer à ce propos un mot de sir Gerald Fitzmaurice dans la commission de droit international lors de sa 535^e réunion et je vous prie de me permettre de le citer en anglais : *"To regard the question as one involving primarily human rights would be to confuse the real issue."* J'en viens maintenant au deuxième volet et je vous prierai, Monsieur le président, de m'interrompre quand vous jugez que le moment pour une pause est venu :

2. Mise à part la qualification du droit à l'«information consulaire», s'agit-il d'un droit de la défense faisant partie du droit à un procès équitable ?

6.25. L'Allemagne dit que le droit en question doit être assimilé aux droits de la défense, c'est-à-dire au droit à un procès équitable. La cour interaméricaine se prononce dans le même sens.

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[44] Cette opinion est notamment partagée par Françoise Tulkens, «L'Union européenne devant la Cour européenne des droits de l'homme», *Revue Universelle des droits de l'Homme* 2000, p. 50, 51; voir aussi Claudia Sciotti, *La concurrence des traités relatifs aux droits de l'homme devant le juge national*, Bruxelles 1997; Stefan Trechsel, "*Inflation in the Field of Human Rights ?*", *Nijmegen University Press*, 1999; version allemande *: Inflation im Bereich der Menschenrechte?*, dans *ZEUS, Zeitschrift für Europarechtliche Studien, Universität des Saarlandes, Heft* 3, 1998, p. 371.

On évoque la tendance à une interprétation évolutive des traités internationaux, notamment en matière de droits de l'homme[45]. Nous connaissons cette tendance et nous ne lui sommes certainement pas opposés en principe. Néanmoins, il serait trop simple d'invoquer l'interprétation évolutive chaque fois qu'on aimerait élargir la portée de droits fondamentaux d'une façon systématique. Il est vrai que la Cour européenne des droits de l'homme s'est parfois référée à ce même principe, mais nullement de façon systématique — il y a beaucoup d'arrêts qui vont dans le sens contraire. Ceci a été très brillamment démontré par Olivier de Schutter[46], je ne peux que vous recommander son article qui a pour titre entre autres : «Un essai en destruction». Je me permets de vous rappeler que, de toute manière, les droits de l'homme ne se prêtent guère à des conceptions quantitatives. Ils peuvent même entrer en conflit entre eux. Par exemple, l'exercice de la liberté d'expression peut violer le droit au respect de la vie privée, le droit à disposer du temps nécessaire à la préparation de la défense, exercé de manière excessive, peut causer un problème sous l'angle du «délai raisonnable» de la procédure, etc.

6.26. De manière pas très précise, la cour interaméricaine dit que le «droit à la présence d'un avocat lorsque l'on parle fait déjà partie du droit et de la jurisprudence des systèmes juridiques les plus avancés»[47]. Or, avec tout le respect dû à cette Haute Cour, le passage cité appelle certaines précisions. D'une part, il convient de noter que dans un arrêt relativement récent, John Murray contre Royaume-Uni, la Cour européenne des droits de l'homme n'a pas reconnu de façon absolue un droit à la présence du défenseur dès le premier interrogatoire[48]; d'autre part, on peut et on doit se demander si ce sont vraiment les «systèmes les plus avancés» qui sont décisifs. Ce n'est certainement pas la démarche de la Cour européenne des droits de l'homme que de s'orienter d'après les systèmes juridiques qui lui paraissent être les plus «progressifs».

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[45] *Loc. cit.*, par. 113 et suiv.

[46] Olivier De Schutter, «L'interprétation de la Convention européenne des droits de l'homme : un essai en destruction», *Revue de droit international, de sciences diplomatiques et politiques*, 1992, p. 83 et suiv.

[47] OC 16/99, par. 117 : *"Son ejemplo de este carácter evolutivo del proceso los derechos a no autincriminarse y a declarar en presencia de abogado, que hoy dia figuran en la legislación y en lajurisprudencia de los sistemas jurídicos más avanzados" ("An example of the evolutive nature of judicial process are the rights not to incriminate oneself and to have an attorney present when one speaks")*.

[48] Cour européenne des droits de l'homme, arrêt John Murray contre Royaume-Uni du 8 février 1996, *Recueil des arrêts et décisions 1996-I*, p. 30 et suiv., 54 par. 62 et suiv.; voir aussi l'arrêt Imbrioscia contre Suisse du 24 novembre 1993, *série A n° 275*, p. 13, par. 38.

6.27. De toute façon, la cour interaméricaine ne mentionne aucun système qui considérerait le droit à l'«information consulaire» comme un droit de la défense. En ce qui concerne l'interprétation de ce texte, ce sont les règles générales telles qu'elles ont été définies à l'article 31 de la convention de Vienne sur le droit des traités qui s'appliquent bien évidemment, et il est précisé au chiffre 3, lettre *b)* de cette disposition qu'il sera tenu compte «de toute pratique ultérieurement suivie dans l'application du traité». Dans ce contexte, le droit comparé joue un rôle particulièrement important. Ainsi, la Commission européenne des droits de l'homme, par rapport à la procédure pénale, a dit qu'elle «trouve qu'il est nécessaire de prendre en considération la pratique dans différents pays qui sont membres du Conseil de l'Europe»[49]. Cette opinion est largement partagée par la doctrine[50]. Howard Charles Yourow, au bout d'une étude approfondie, constate qu'«une attention spéciale est accordée au rôle de consensus dans le droit et la pratique nationaux des Etats Parties»[51].

6.28. Examinons donc la portée du droit à l'information consulaire sous un angle de droit comparé. Afin de savoir ce qu'est la pratique dans plusieurs Etats, nous avons d'abord examiné des codes de procédure pénale, les codes de plusieurs pays — Allemagne, Autriche, Belgique, France, Italie, Pays-Bas, Portugal et Suisse[52]. Il s'est avéré qu'aucun de ces codes ne se réfère au droit à l'information consulaire. Si l'article 520, paragraphe 2, du code de procédure pénal espagnol se réfère aux étrangers, c'est seulement pour dire que les étrangers auront le droit de faire communiquer certaines informations au poste consulaire de leur pays. Par contre, il ne parle pas d'une obligation de les informer de ce droit. Et ce n'est que de cette obligation que la Cour est saisie aujourd'hui.

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[49] *"finds it necessary to take into consideration the practice in different countries which are members of the Council of Europe"*, Commission européenne des droits de l'homme, req. 2518/ 65, X. c. Danemark, déc. du 24 septembre 1965, *Annuaire de la convention Européenne des droits de l'homme VIII*, p. 370; déc. 2742/66, X. contre Autriche du 1er avril 1966, *Annuaire IX*, p. 550 et autres.

[50] Voir ouvrages cités dans Stefan Trechsel, *Die europäische Menschenrechtskonvention, ihr Schutz der persönlichen Freiheit und die schweizerischen Strafprozessrechte*, Berne 1974, p. 142, note 390.

[51] *"Special attention is paid to the role of the consensus of the national law and practice of the States Parties", Howard Charles Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Dordrecht 1996, p. 185.

[52] Il est rappelé qu'il n'y a pas moins de 29 codes de procédure pénale dans ce pays.

6.29. S'agit-il simplement d'une omission des législateurs que la doctrine rectifie ? Aucunement. En effet, notre étude d'un nombre de traités et commentaires[53] n'a révélé pratiquement aucune trace de la convention de Vienne dans la littérature sur la procédure pénale. Nous avons étudié un nombre de traités et commentaires et nous n'avons pratiquement pas trouvé de trace, exception faite pour un commentaire allemand celui de Kleinknecht, que mes confrères, très certainement connaissent, ce commentaire renvoie aux *"Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten"* («les directives concernant les rapports avec l'étranger en matière pénale») [c'est ma propre traduction], les chiffres sont 135 et 136. Or, bien que ce commentaire contienne également d'autres *"Richtlinien"* on cherche en vain ces *"Richtlinien"* là, ce qui veut dire que pour les pénalistes ils ne sont pas à portée de main.

6.30. En outre, nous avons encore suivi une autre méthode pour vérifier si le droit à l'information consulaire pourrait être considéré comme un droit de la défense en procédure pénale. Nous avons examiné des codes de procédure pour vérifier si l'absence d'information consulaire pourrait constituer un moyen de cassation. Or, le résultat de cette recherche est encore négatif, notamment pour le droit allemand.

6.31. La violation d'une règle de droit international peut donner lieu à cassation lorsqu'il est démontré que la décision aurait peut-être été différente si la faute n'avait pas été commise[54]. Aucun exemple n'est donné, dans le «Commentaire de Karlsruhe» ou ailleurs, de la convention de

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[53] Allemagne : Werner Beulke, Strafprozessrecht, 2. A. Heidelberg 1996; Hans Dalu/Hans Dahr, *Die Revision im Strafprozess*, 5. Aufl., München 1993; Albin Eser, *Einführung in das Strafprozessrecht*, Freiburg 1983; Walter Gollwitzer, in *Löwe-Rosenberg, Grosskommentar*, 31. Lieferung, Berlin 1992; Theodor Kleinknecht/Lutz Meyer-Grossner, *Strafprozessordnung*, Kurz-Kommentar, 44. Aufl., München 1999; Hans-Heiner Kühne, *Strafprozessrecht*, 5. Aufl., Heidelberg 1999; Gerd Pfeifer, *Karlsruhe Kommentar zur Strafprozessordnung* ..., 3. Aufl., München 1993; Claus Roxin, *Strafverfahrensrecht*, 24. Aufl., München 1995; Heinrich Rüping, *Das Strafverfahren*, 2. Aufl., München 1983; Werner Sarstedt/Rainer Hamm, *die Revision in Strafsachen*, 6. Aufl., Bemlin/New York 1998; Friedrich-Christian Schroeder, *Strafprozessrecht*, 2. Aufl., München 1997.

Austria : Stefan Seiler, *Strafprozessrecht*, 3. Aufl., Wien 1999.

Espagne : Vicente Gimeno Sendra/Victor Moreno Catena/Valentin Dortes Domingues, *Derecho Procesal Penal*, Madrid 1996.

France : Jean Pradel, *Procédure pénale*, 6e éd., Paris 1992.

Italie : Mario Chiavario (ed.), *Commento al Codice di Procedura Penale*, Torino 1993 ss.

Portugal : Jorge de Figueiredo Dias, *Direito precessual penal*, Coimbra 1974.

Suisse : Jürg Aeschlimann, *Einführung in das Strafprozessrecht*, Bern 1997; Robert Hauser/Erhard Schweri, *Schweizerisches Strafprozessrecht*, 4. Aufl., Basel 1999; Thomas Maurer, *Das bernische Strafverfahren*, Bern 1999; Niklaus Oberholzer, *Grundzüge des Strafprozessrechts*, Bern 1994; Niklaus Schmid, *Strafprozessrecht*, 3. Aufl., Zürich 1997.

[54] Gerd Pfeiffer, *loc. cit.*, N 33.

Vienne dans ce contexte. Pour la Suisse, Piquerez[55], dans son récent et volumineux traité sur la procédure pénale, mentionne la convention de Vienne sur les relations diplomatiques lorsqu'il parle des immunités, mais ne se réfère nulle part à la convention sur les relations consulaires.

6.32. Il ressort, il me semble, Monsieur le président, Madame et Messieurs les juges, de cette brève étude que l'information prévue à l'article 36 de la convention de Vienne n'est considérée, ni par le législateur ni par la doctrine, comme une norme relevant du droit de la procédure pénale et, partant, un droit de la défense en procédure pénale. Ceci est notamment patent pour l'Allemagne.

Le PRESIDENT : Monsieur le professeur, si vous voulez bien après l'examen de la législation et de la doctrine, vous allez passer à la jurisprudence, nous pourrions peut-être nous arrêter là pour une pause d'un quart d'heure.

M. TRECHSEL : Je suis entièrement à votre service, Monsieur le président.

Le PRESIDENT : Je vous remercie.

L'audience est suspendue de 16 h 25 à 16 h 45.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne à nouveau la parole au professeur Trechsel.

M. TRECHSEL : Merci, Monsieur le président. Dans votre grande sagesse vous avez prévu que, après avoir parlé de la législation et de la doctrine, j'allais maintenant me pencher sur la jurisprudence et c'est effectivement ce que je me propose de faire.

6.33. Pourtant, là, le résultat est toujours négatif. Nous n'avons pas réussi — mais il me paraît qu'il incomberait à l'Allemagne de le faire — à trouver un seul arrêt qui aurait cassé un jugement pour violation de la convention de Vienne.

6.34. Un arrêt d'abord de la cour de cassation italienne[56] a répondu très clairement par la négative. Le requérant, de nationalité britannique, s'était plaint de l'absence de toute information du consul britannique tant de son arrestation que de son procès. Le pourvoi est rejeté. La cour de cassation relève que le droit de «pourvoir à sa représentation en justice» n'avait qu'un caractère complémentaire et ne pouvait remplacer en rien le droit de l'accusé étranger de se procurer lui-même un avocat de son choix. Par ailleurs, la cour de cassation italienne note que l'accusé n'avait pas besoin d'une assistance complémentaire puisqu'il avait le droit d'exercer son droit à se défendre au même titre qu'un ressortissant italien. Et la cour de cassation de conclure :

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[55] Gérard Piquerez, *Procédure Pénale Suisse*, Zurich 2000, N. 411 et suiv..

[56] Arrêt Yater du 19 février 1973, publié en langue anglaise dans *Italian Yearbook of International Law* 2 (1976) p. 336 ss.

> «Par conséquent, il ne saurait y avoir violation des règles de procédure se rapportant à la défense de l'accusé en raison du manquement à l'information de l'autorité susdite et que cette dernière n'a pas contribué à la défense de l'accusé qui a déjà un avocat de confiance et n'a pas besoin d'un autre...»[57]

Notons en passant que cet arrêt ne semble pas concerner le droit à l'information lui-même.

6.35. Dans un arrêt du 8 avril 1988, n° 60/88[58], la Première Chambre du Tribunal constitutionnel Espagnol a tranché de façon analogue. Entre autres, les requérants s'étaient plaints de ce que leur arrestation n'eût pas été communiquée au poste consulaire de leur pays. Cette circonstance dont ils ne s'étaient d'ailleurs pas plaints au cours de la procédure précédente, n'avait constitué aucun manquement aux droits de la défense dans la procédure pénale menée contre les requérants[59].

6.36. Pour quitter le contexte européen, j'ajouterai la référence à un arrêt australien[60]. La cour d'appel de New South Wales s'exprime de façon très claire. Le juge Street a décidé :

> «Même en attribuant le plus grand poids à l'article 36 [de la convention de Vienne], je ne vois pas comment il peut être soutenu qu'il pourrait avoir la moindre influence sur le cours d'une investigation par l'interrogatoire d'un étranger venant dans ce pays. L'article traite de la liberté de communication entre consuls et leurs nationaux. Il n'indique rien qui aurait une portée sur une procédure d'instruction par interrogatoire.»[61]

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[57] Notre traduction.

[58] Publié au *Boletín Oficial del Estado* du 5 mai 1988.

[59] *"Los derechos de los demandantes no fueron, pues, violados por las causas que acabamos de considerar, ni tampoco se produjo tal lesión por lo que arguyen en orden a la supuesta falta de comunicación de su detención a la Oficina Consular de su país (art. 520.2,*d) *in fine de la Ley de Enjuiciamiento Criminal), circunstancia ésta que, sobre no haber suscitado protesta alguna en el procedimiento que antecede, no podría hoy decirse que deparase indefensión alguna en la causa criminal que se siguió contra los actores"*.

[60] R v. Abbrederis, *Court of Criminal Appeal of New South Wales*, 3 April, 26 June 1981, Sydney, 36 *Australian Law Reports*, p. 122 et suiv.

[61] Notre traduction de l'anglais: *"Even giving the fullest weight to the prescriptions in Art. 36, I do not see how it can be contended that they in any way affect the carrying out of an investigation by interrogation of a foreign person coming to this country. The article is dealing with freedom of communication between consuls and their nationals. It says nothing touching upon the ordinary process of an investigation by way of interrogation."*

Evidemment nous partageons entièrement cet avis.

6.37. L'Allemagne aurait pu attirer votre attention sur deux décisions judiciaires provenant du Royaume-Uni concernant, respectivement, deux personnes de nationalité néerlandaise et libanaise[62]. En effet, dans les deux affaires, le juge a déclaré nulles les dépositions faites par les personnes arrêtées du fait qu'elles n'avaient pas été avisées de leur droit à contacter le poste consulaire.

6.38. Or, ni l'une ni l'autre de ces décisions ne se fondent sur la convention de Vienne. Elles invoquent plutôt la loi anglaise elle-même, les articles 76 et 78 du *Police and Criminal Evidence Act* 1984, qui permettent au juge d'exclure comme moyen de preuve des dépositions ou des confessions faites dans des conditions qui soulèvent des doutes quant à l'équité de la procédure. Dans le deux cas, le juge, M. Sich admet cependant une exception pour le cas ou la personne arrêtée aurait vécu pendant de nombreuses années dans le pays et connaîtrait bien la langue locale. Les frères LaGrand se trouvaient sans aucun doute dans le champ d'application de cette exception et je pense que ces jugements démontrent que contrairement à ce qu'a soutenu hier le Gouvernement allemand, le fait de cette résidence de longues années en Arizona, n'est pas du tout sans pertinence. Par ailleurs, nous n'avons pas la moindre indication et même aucune allégation selon laquelle l'interrogatoire des frères LaGrand aurait prêté à critique. Nous n'avons donc effectivement trouvé aucun précédent qui pourrait avoir une incidence sur la présente affaire.

6.39. Par ailleurs, si certains codes de procédure prévoient l'exclusion de moyens de preuve obtenus de manière douteuse, voire illégale, d'autres codes ne connaissent pas de règle analogue. Même la Cour européenne des droits de l'homme n'a pas repris la règle de l'exclusion — et je me réfère ici aux arrêts Schenk contre Suisse[63] et Khan contre Royaume-Uni[64], où des bandes magnétiques enregistrées de façon douteuse étaient utilisées au procès. Et dans l'affaire Khan, il était tout à fait clair que l'enregistrement avait été fait en violation de l'article 8 de la convention européenne des droits de l'homme et constituait le seul moyen de preuve et néanmoins la Cour européenne des droits de l'homme n'a pas jugé qu'il y avait violation du droit à un procès équitable. Il faut dire cependant que cet arrêt d'une chambre a été référé à la Grande Chambre de la cour et le dernier mot n'a pas été dit dans cette affaire.

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[62] Une information sur ces arrêts est publiée dans *Legal Action*, 23 décembre 1997.

[63] Cour européenne des droits de l'homme, arrêt Schenk contre Suisse du 12 juillet 1988, *série A n° 140*.

[64] Cour européenne des droits de l'homme, arrêt Khan contre Royaume-Uni du 12 mai 2000 — cette affaire a été déférée à la Grande Chambre.

6.40. Il y a un argument supplémentaire qui milite contre l'hypothèse que le droit à l'information consulaire pourrait être considéré comme un droit de la défense. Il apparaît clairement lorsque l'on considère un aspect important de droit comparé.

6.41. La convention de Vienne, en son article 36, ne concerne que les étrangers qui ont été *arrêtés*. Dans la tradition anglo-américaine, l'ouverture des poursuites pénales est liée de façon indissoluble à l'arrestation de la personne soupçonnée. Alors que l'arrestation ne signifie pas nécessairement, comme nous le verrons tout à l'heure, l'introduction de poursuites pénales, cette dernière implique nécessairement l'arrestation, sauf pour les cas de la *"citation"* qui marque, cependant, un développement récent pour des affaires d'importance mineure.

6.42. Or, beaucoup de systèmes de procédure pénale, et ce sont à mon avis les plus modernes, n'opèrent pas de ce cette façon. Dans les pays du continent européen, pour me limiter à cette région, par exemple en Allemagne, Autriche, Belgique, France, Italie ou Suisse, l'arrestation doit être l'exception. Il y a à ce sujet un consensus pratiquement unanime[65]. Ce n'est que dans des circonstances exceptionnelles qu'un suspect est arrêté. Il est vrai que le danger de fuite sera retenu plus facilement à l'encontre d'un étranger, mais ce n'est pas le cas pour un étranger assimilé qui a sa résidence habituelle dans le pays où il a été arrêté.

6.43. A la lumière de cet état de faits, il s'avère que l'application hypothétique de la convention de Vienne en matière de procédure pénale ne serait pas du tout uniforme.

6.44. En effet, nous pouvons comparer la relation entre le champ d'application de la convention de Vienne et celui des droits de la défense ou de la procédure pénale même sous forme de deux cercles qui ne sont superposés que partiellement. La convention de Vienne s'applique à toute arrestation, c'est-à-dire, celle d'une personne soupçonnée d'avoir commis une infraction; mais aussi à l'arrestation dans le contexte de procédures d'expulsion ou d'extradition; à l'arrestation d'une personne pour cause de maladie mentale ou contagieuse, d'état d'ivresse ou de vagabondage; à l'arrestation aux fins d'exécuter une sanction pénale ou en vue encore de garantir l'exécution d'une obligation prescrite par la loi[66].

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[65] Voir par exemple la résolution 65 (11) du Comité des ministres du Conseil de l'Europe.

6.45. L'interprétation proposée par l'Allemagne aurait donc comme conséquence que le prévenu arrêté — c'est-à-dire tout prévenu dans les pays du *common law*, mais seulement une minorité dans les pays du système continental — profiterait de «droits de la défense» qui sont niés au prévenu en liberté. Sans doute, ce dernier ne rencontrera-t-il aucun obstacle pour contacter «son» consulat. Mais il ne sera pas informé de cette possibilité et il est peu probable qu'il sache davantage sur le droit consulaire que le prévenu arrêté. Comment justifier le fait que ce dernier profite d'un traitement préférentiel pour ce qui concerne les droits de la défense ?

6.46. La cour interaméricaine ne semble pas avoir pris ces réalités en considération. A propos de l'interprétation des mots «sans retard», elle dit que l'information doit être donnée au moment de l'arrestation et, en tout cas, avant que l'accusé ne fasse une déposition ou une confession à la police ou aux autorités judiciaires[67]. La dernière partie reprend littéralement la question posée par le Mexique. Or, avec tout notre respect, on voit mal le sens de cette précision. Elle semble s'inspirer du fameux *"Miranda warning"*[68]. Or, cette analogie est-elle justifiée ? Nous le contestons vivement.

6.47. Rappelons que toute personne soupçonnée d'avoir commis une infraction a le droit d'être assistée par un défenseur. Tout étranger n'a cependant pas droit à une assistance consulaire. Si l'on prend la thèse de la cour interaméricaine à la lettre, même un étranger arrêté et assisté par un avocat de son choix ne pourrait être valablement interrogé avant d'avoir été informé de ses droits consulaires. Pourtant, cette information, contrairement à celle visée par l'arrêt Miranda, n'a aucune conséquence juridique.

6.48. Et puis, à quoi servirait pareille attente ? Il ne saurait être question de reporter l'interrogatoire jusqu'à ce qu'une assistance consulaire n'ait été effectivement apportée à la personne arrêtée, puisqu'il est difficile de prévoir la réaction du poste. C'est la législation nationale sur la procédure pénale qui règle l'enquête et non pas la convention de Vienne. Or, à notre connaissance, aucune législation n'interdit l'interrogatoire du prévenu étranger avant qu'il ait été informé de ses droits consulaires, et ceci à juste titre comme nous venons de le voir. Nous nous permettons de suggérer respectueusement qu'il n'incombe guère à la Haute Cour de céans de réecrire les codes de procédure pénale des pays de ce monde.

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[66] Exemples tirés de l'article 5, par. 1 de la convention européenne des droits de l'homme.

[67] [L'article 36 de la convention de Vienne] *"requiere que las autoridades del Estado receptor informen a todo detenido extranjero de los derechos que le confiere dicho artículo en el momento del arresto y en todo caso antes de que el detenido rinda cualquier declaración o confesión ante las autoridades policiacas o judiciales" "[...] should be interpreted as requiring the authorities of the host State to inform any detained foreign national of the rights accorded to him in that article, 'at the time of the arrest, and in any case before the accused makes any statement or confession to the police or judicial authorities.'")* loc. cit. par. 102.

[68] 384 *US*, 436 (1966).

6.49. Bien que nous rejetions donc sans réserve la théorie selon laquelle il existerait un lien entre le droit à l'information consulaire et les droits de la défense, nous allons maintenant aborder le troisième et dernier volet de notre exposé :

3. Dans l'affirmative *(quod non)*, quelles peuvent être et ne pas être les conséquences d'une violation d'un tel droit ?

6.50. L'Allemagne semble soutenir que pareille violation aurait pour conséquence une nullité absolue du jugement qui, en tout cas, rendrait automatiquement illégale son exécution. Or, tel n'est certainement pas le cas. Rappelons que la Cour européenne des droits de l'homme répète constamment que seul l'examen d'une procédure prise dans son ensemble permet de dire si elle a été équitable[69] — l'absence de l'information consulaire ne saurait guère, même à supposer qu'elle fasse partie des droits de la défense, avoir pour effet, à elle seule, de rendre une procédure non équitable.

6.51. Ensuite, un exemple tiré de la cour constitutionnelle fédérale allemande à laquelle le professeur Meron s'était déjà référé, l'affaire Pakelli. Le requérant avait été condamné à deux ans et trois mois de prison pour infraction à la législation sur les stupéfiants et fraude fiscale. Son défenseur, M. Wingerter, forma un pourvoi en cassation. Surgit alors un litige sur la question de savoir si cet avocat était autorisé à agir pour M. Pakelli malgré le fait qu'il avait, auparavant, défendu un de ses complices. La Cour de justice fédérale décida de tenir, très exceptionnellement, une audience, mais refusa au requérant le bénéfice de l'assistance judiciaire. Il n'était pas en mesure de payer un avocat. Par la suite, la Cour européenne des droits de l'homme allait constater qu'il y avait eu, de ce fait, violation du droit à être défendu au sens de l'article 6, paragraphe 3 *c)* de la convention.

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[69] Pour ne donner qu'un exemple, voir Cour européenne des droits de l'homme, arrêt Kamasinski contre Autriche du 19 décembre 1988, *série A n° 168*, par. 98.

6.52. Sur la base de cet arrêt, M. Pakelli tenta d'obtenir une revision de sa condamnation. Il se heurta cependant à un refus de la part de la Cour constitutionnelle fédérale. Celle-ci considéra que la violation du droit de la défense ne justifiait pas une cassation du jugement. Elle admit qu'il y eût eu violation, mais cette violation, toujours selon la Cour constitutionnelle, n'était pas assez grave pour porter atteinte aux principes de l'Etat fondé sur le droit *(Rechtsstaatsprinzip)*, seul argument qui aurait dans les circonstances de la cause permis de faire droit au requérant[70].

6.53. Notons tout de suite qu'il ne s'agit pas ici d'une exception. En effet, les Etats Parties à la convention européenne des droits de l'homme ont mis longtemps pour adapter la loi interne de manière à pouvoir reviser un jugement de condamnation issu d'une procédure au sujet de laquelle la Cour européenne avait constaté une violation du droit à un procès équitable[71]. La Suisse l'a fait en 1991[72], l'Allemagne devait attendre le 9 juillet 1998[73], pour la France, ce n'est que la loi du 15 juin 2000 qui permettra désormais le réexamen d'une décision rendue en matière pénale à la suite du prononcé d'un arrêt de la Cour européenne. Quant au Royaume-Uni, il n'a pas adopté de disposition analogue dans le cadre de la récente loi d'incorporation, mais là, la revision est beaucoup plus simple qu'en d'autres pays. Je renvoie au *referral proceedings*.

6.54. Je vous prie de noter que ces amendements de la législation nationale ne permettent nullement de déclarer directement nul un arrêt issu de procédures critiquées par «Strasbourg». En outre, nous ne disons pas — et j'insiste sur ce point — qu'avec cet arrêt Pakelli, l'Allemagne aurait violé la convention faute de prévoir une revision.

6.55. En effet, le droit conventionnel lui-même ne prévoit pas la nullité automatique d'un jugement de par le simple fait qu'au cours de la procédure il y aurait eu une violation des droits de la défense. Permettez-moi d'illustrer cette thèse : l'article 5, paragraphe 1, de la convention européenne des droits de l'homme permet la privation de liberté d'une personne détenue régulièrement après condamnation par un tribunal compétent. Or, l'exécution d'une sanction privative de liberté est légale même dans l'hypothèse où la condamnation s'est produite au terme d'une procédure dans laquelle l'article 6 a été violé[74].

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[70] EuGRZ 1985, p. 654; *Strafverteidiger* 1987, p. 185, avec annotation de S. Trechsel.

[71] Voir à ce sujet Andrew Drzemczewski, *Revue universelle des droits de l'homme* 1992, p. 127 ss.

[72] Loi fédérale sur l'organisation judiciaire, art. 139.

[73] Code de procédure pénale, par. 359.

6.56. L'arrêt Drozd et Janousek[75] constitue un exemple particulièrement frappant. La France avait exécuté une peine privative de liberté que le *"Tribunal de Corts"* d'Andorre, un tribunal qui ne satisfait pas les exigences de l'article 6, le tribunal indépendant et impartial établi par la loi, et la France, donc, a exécuté cette sentence. L'exécution de cette peine n'était, de l'avis de la Cour, pas contraire à l'article 5, paragraphe 1, de la convention européenne des droits de l'homme. En effet, une privation de liberté ne serait contraire à cette disposition que si la condamnation résultait d'un «déni de justice flagrant». Je pense qu'en ce qui concerne la présente affaire, même l'Allemagne ne prétend pas sérieusement que nous soyons confrontés à un véritable déni de justice.

6.57. Pour ce qui est de la peine capitale, on pourrait être tenté, et l'Allemagne cède à cette tentation, ce qui est tout à fait compréhensible, de préconiser une approche plus stricte. Or, la cour de Strasbourg s'est prononcée de façon analogue dans l'affaire Soering[76] qui avait précédé l'arrêt Drozd et Janousek :

> «La Cour n'exclut pas qu'une décision d'extradition puisse exceptionnellement soulever un problème sur le terrain de ce texte [c'est-à-dire l'article 6 de la convention] au cas où le fugitif aurait subi ou risquerait de subir un déni de justice flagrant.»

L'on se souviendra du fait que dans cette affaire le requérant risquait l'extradition aux Etats-Unis pour se voir infliger la peine de mort en Virginie.

6.58. De manière générale, il convient de noter que les droits de la défense tels qu'ils sont prévus dans le pacte et dans la convention ne font aucune distinction selon la peine encourue. Surtout, ils s'appliquent de la même façon, que le prévenu risque une peine privative de liberté ou la peine de mort. Sans doute, il y aura des nuances, mais elles ne sauraient être d'une importance telle à permettre un bouleversement des règles de procédure. Il ne serait guère justifié de gonfler le droit à l'information consulaire aux dimensions d'un droit fondamental de la défense pour les cas uniquement où le prévenu risque la peine de mort, mis à part le fait qu'au moment de l'arrestation il ne sera pas toujours évident que c'est là le risque qu'il court.

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[74] Cour européenne des droits de l'homme, *Engel et autres c. Pays-Bas*, arrêt du 23 novembre 1996, *série A n° 22*, par. 68, p. 28. Voir aussi Jochen Abr. Frowein/Wolfgang Peukert, *Europäische MenschenRechtsKonvention*. EMRK-Kommentar, 2ᵉ éd., Kehl/Strasbourg/Arlington 1996, Art. 5 N 52; Arthur Haefliger/Frank Schürmann, *Die Europäische Menschenrechtskonvention und die Schweiz*, 2ᵉ éd., Berne 1999, p. 90; Stefan Trechsel, *"Liberty and Security of Person"*, in R. St.J. Macdonald, F. Matscher and H. Petzold, *The European System for the Protection of Human Rights*, Deventer 1993, p. 277, *298* et suiv.; Van Dijk/Van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3ᵉ. éd., The Hague 1998, p. 351, et Harris/O'Boyle/Warbrick, *Law of the European Convention of Human Rights*, London/Dublin/Edinburgh 1995, p. 107, *are critical of this case-law*.

[75] Cour européenne des droits de l'homme, arrêt Drozd et Janousek contre France et Espagne du 26 juin 1992, *série A n° 240*, par. 110.

[76] Cour européenne des droits de l'homme, arrêt Soering contre Royaume-Uni du 7 juillet 1989, par. 113.

6.59. Un indice ultérieur contre la thèse de la nullité du jugement entaché, c'est-à-dire qui est le fruit de procédures en violation du droit au procès équitable, peut être trouvé dans la pratique du comité des ministres du Conseil de l'Europe chargé de surveiller l'exécution des jugements de la Cour. En effet, le comité des ministres adresse au Gouvernement de l'Etat dans la juridiction duquel la convention a été violée des questions sur les mesures qu'il a prises pour exécuter l'arrêt.

6.60. Si la thèse de l'Allemagne était correcte, le comité des ministres devrait se préoccuper du fait qu'il existe, dans le cas des procédures pénales, une condamnation du requérant qui est fondée sur une procédure non équitable. Or, il n'en est rien. Je vais simplement mentionner les noms de quelques affaires où il y a eu violation de l'article 6 et le comité des ministres s'est contenté du fait que des compensations avaient été payées ; dans une affaire, une partie de la peine a été remise. Je mentionne donc — et vous trouverez les références aux décisions du comité des ministres dans le texte écrit — les affaires Artico[77], Deweer[78], Pakelli[79], Kostovski[80], Van Mechelen[81], et John Murray[82].

6.61. Et il y a plus : la condamnation reste intacte même lorsqu'elle enfreint la convention sur le fond. Tel était le cas, par exemple, dans l'affaire Kokkinakis où les requérants avaient été condamnés pour prosélytisme, ce qui constituait une violation du droit à la liberté de religion[83][84].

6.62. Les résolutions du comité des ministres n'ont d'ailleurs aucun caractère préjudiciel. Au cas où une nouvelle violation analogue devrait se produire, la procédure serait identique : la

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[77] Résolution du 18 décembre 1980.

[78] Résolution du 9 décembre 1983.

[79] Résolution du 26 janvier 1984.

[80] Résolution du 9 juin 1994.

[81] Résolution DH (99) 124.

[82] Résolution du 14 février 2000, DH (2000) 26.

[83] Cour européenne des droits de l'homme, arrêt Kokkinakis contre Grèce du 25 mai 1993, *série A n° 260*.

[84] Résolution du 15 décembre 1997, DH (97) 574.

Cour constate la violation et alloue, le cas échéant, une somme d'argent pour réparation du tort moral; par la suite, le comité des ministres se bornera à contrôler si cette somme a été payée et si, éventuellement, d'autres mesures ont été prises afin de donner suite à l'arrêt de la Cour. Cependant, il ne se prononcera pas sur la question d'une cassation du jugement de condamnation. Pour exemple, je me permets de vous référer à l'affaire Goddi contre Italie[85] qui a suivi l'affaire Artico déjà citée.

6.63. Est-ce là un résultat surprenant ? Pas du tout ! Le principe de l'autorité de la chose jugée est essentiel dans tout Etat fondé sur le droit. Il est exigé par la sécurité du droit qui s'oppose parfois à l'équité. Le pouvoir exécutif doit être dans l'obligation d'exécuter les jugements définitifs et ne peut pas refuser de le faire pour la simple raison qu'il y aurait des doutes sur l'équité de la procédure ou la bonne application de la loi pénale.

6.64. Dans ce domaine cependant, un nouveau développement s'annonce, et je ne vous le cacherai pas. En effet, une Recommandation du comité des ministres du Conseil de l'Europe du 19 janvier de cette année[86] invite les parties contractantes «à s'assurer qu'il existe au niveau interne des possibilités adéquates de réaliser, dans la mesure du possible, la *restitutio in integrum*. Ce développement que nous saluons vivement ne fait cependant que renforcer notre argument. En effet, il affirme notre thèse selon laquelle une violation des droits de la défense ne peut en aucun cas amener à la nullité automatique du jugement.

Conclusions

6.65. Permettez-moi, Monsieur le président, Madame et Messieurs les juges, de conclure en formulant nos réponses aux trois questions que je me suis proposé d'aborder :

1. Le droit d'être informé de la possibilité du contact consulaire fait-il partie des droits de l'homme ?

   Notre réponse est négative : il ne s'agit pas d'un droit fondamental.

2. Mise à part la qualification, s'agit-il d'un droit de la défense faisant partie du droit au procès équitable ?

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[85] Cour européenne des droits de l'homme, arrêt Goddi contre Italie du 9 avril 1984, *série A n° 76*, et résolution du comité des ministres dans cette affaire, du 7 décembre 1984.

[86] Recommandation n° R (2000) 2.

Là encore, notre réponse est «non». Ce droit est étranger tant au droit de procédure pénale qu'aux droits de la défense garantis par les droits de l'homme. C'est un droit auxiliaire dont l'unique fonction est de faciliter l'exercice des fonctions consulaires.

3. Dans l'affirmative *(quod non)* mais ce n'est pas le cas, quelles peuvent être et ne pas être les conséquences d'une violation de ce droit ? Une violation du droit à l'information consulaire constitue la violation d'une obligation découlant d'un traité international mais elle ne peut en aucun cas entraîner automatiquement la nullité d'une condamnation pénale et une allégation de ce genre ne peut pas arrêter la procédure d'exécution.

6.66. Je vous remercie de votre grande patience, Monsieur le président, Madame et Messieurs les juges, et je vous prie maintenant de donner la parole à M. le professeur Matheson.

Le PRESIDENT : Je vous remercie beaucoup, Monsieur le professeur Trechsel. I now give the floor to Professor Matheson.

Mr. MATHESON:

7.1. Mr. President and distinguished Members of the Court, it is again my great honour and pleasure to appear before you on behalf of the United States. This afternoon I will address the request of Germany that the Court declare that the United States violated international legal obligations by failing to comply with the Court's Order indicating provisional measures.

7.2. As the Court is aware, the United States takes the view, as a general matter, that indications of provisional measures by the Court do not give rise to binding legal obligations. The US position is explained in some detail in our Counter-Memorial, which reviews the considerable body of scholarly opinion and State practice suggesting that such measures do not have legally binding effect[87]. This, of course, is an important and a difficult issue that has been the subject of considerable debate over the years, and that the Court has not yet found necessary to resolve.

7.3. However, it is our view that it is neither necessary nor appropriate for the Court to attempt to resolve this general issue in the present case, as Germany has proposed; rather, we believe that the relief requested by Germany on this point should be denied for several other

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[87] See US Counter-Memorial, pp. 113-135.

reasons without the need to resolve this general issue. First, whether or not the Court as a general matter has the authority to hand down binding provisional measures, in this particular case the measures indicated by the Court were -- by their own terms — not binding in character. Second, whatever the character of the Court's Order, the United States did in fact comply with it, in that it took every step reasonably available to it, given the extreme circumstances in which it had to act. Third, the unjustified delay of Germany in bringing its request for provisional measures before the Court until the last possible moment makes it inappropriate to grant Germany's request for relief with respect to this Order. And fourth, the Court can fully and adequately dispose of the merits of this case without any need to resolve this general issue.

The Court's provisional measures in this case were not legally binding

7.4. Let me begin with the first point — that in this particular case the measures indicated by the Court were — by their own terms — not binding in character. The authoritative English text of the Court's Order stated that the United States "should take all measures at its disposal" to ensure that Walter LaGrand was not executed pending a final decision by the Court in these proceedings. It went on to say that the United States "should" transmit the Order to the Governor of Arizona, and "should" inform the Court of all measures which it had taken in implementation of the Order.

7.5. It is immediately apparent from a reading of this text that the language used by the Court is not the language customarily used to create binding legal obligations. The English term "should" is consistently used both in international and domestic practice when the intention is not to create binding obligations, but rather to state expectations or desires about future behaviour. As we have explained in some detail in our Counter-Memorial, this term is deliberately used in various international instruments to indicate that a principle or statement is not intended to be legally binding[88].

7.6. In contrast, when particular measures handed down by a tribunal are viewed as having the character of legal obligations, that tribunal uses different language of understood mandatory character. For example, in its Provisional Measures Order of 1 July of this year in the case concerning *Armed Activities on the Territory of the Congo*[89], the Court stated that both Parties "must" take all measures necessary to comply with various existing obligations of the Parties under international law; this mandatory language reflected the fact that the Parties were already bound to carry out these international obligations. The International Criminal Tribunal for the Former Yugoslavia, in its arrest warrants and orders of surrender, "directs" United Nations member States to arrest indicted persons and surrender them to the Tribunal[90]; this obligatory language reflects the mandatory effect given to such orders pursuant to the relevant decisions of the Security Council under Chapter VII of the Charter. Other examples are given in the US Counter-Memorial[91].

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[88] See *idem*, pp. 107-109.

7.7. Clearly this difference between mandatory and non-mandatory language is meaningful and well understood. It is entirely reasonable for States to rely upon that difference in determining what their obligations are and in advising their domestic authorities. The Court should not be asked at a later time effectively to reverse the clear import and effect of the language of an Order, and thereby hold a State to be liable for breaching a supposed obligation that was not contained in the Order that was handed down.

7.8. Now it has been argued that the language used in the French version of the Court's Order conveys a greater degree of obligation than the English text. In fact, as is recounted in the US Counter-Memorial, the Court declined, in the *Aegean Sea* case[92], to hold that such language created a binding agreement. But in any event, the authoritative text of the Court's Order in the present case was the English text, and accordingly the Order must be construed in accordance with the English version. We submit that the English text is clear in this respect and does not create binding obligations.

7.9. Germany nonetheless has suggested that provisional measures must be regarded as inherently binding because of what it terms "the principle of institutional effectiveness" — that is, that any provisional measures would be without effect or purpose if they were not binding, and therefore must be construed as binding in all cases. Germany has also argued that such measures are inherently binding because the Court's final decision on the merits in a case is binding.

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[89] Case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Request for the Indication of Provisional Measures, Order of 1 July 2000*, para. 47.

[90] *The Prosecutor* v. *Slobodan Milosevic, Warrant of Arrest and Order for Surrender*, case No. IT-99-37-1, 24 May 1999.

[91] See US Counter-Memorial, pp. 107-108.

[92] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, paras. 94-108.

7.10. We disagree with these arguments. Even if a tribunal is thought to have the power to hand down legally binding provisional measures, there is no inherent reason why provisional measures must be given in mandatory form in any particular instance. For example, Article 290 of the Law of the Sea Convention empowers the International Tribunal for the Law of the Sea to "prescribe" provisional measures, a formula that was evidently designed to authorize that Tribunal to hand down legally binding measures[93]. In its Order on Provisional Measures in the *Southern Bluefin Tuna* case[94], the Tribunal chose to issue certain measures using binding language and others of a different character using non-binding language. As one commentator observed:

> "The Tribunal's first four measures . . . are binding, as shown by the Order's use of the mandatory term 'shall'. The fifth and sixth measures . . . are not binding, as shown by the use, following the I.C.J. practice, of the facultative term 'should'."[95]

7.11. An international tribunal may well choose to express its expectations in a non-binding form in a particular case, as a matter of deference to the sovereignty and prerogatives of States before it, or in light of the complexity of a particular case and the limited time available to deal with it. This would, for example, be particularly appropriate where the measures in question deal with matters uniquely within the core sovereign functions of States — such as the administration of the criminal justice system, which is, of course, the case here.

7.12. The fact that provisional measures are not legally binding in a particular case does not deprive them of meaning and significance. They stand as a clear statement of the Court's expectations and desires. As the Court stated in the *Nicaragua* case: "it is incumbent on each party to take the Court's indications seriously into account . . ."[96]. But it remains the case that provisional measures expressed in non-obligatory language do not create legal obligations.

7.13. Nor does the fact that the Court's final decision on the merits in a case is binding mean that provisional measures must necessarily be binding as well. There is no reason why measures indicated at the very outset of a proceeding — in this case, less than a day after the Application was filed — should necessarily assume the same binding character as the final judgment. There is no reason why the Court should not adopt a more deferential mode at this stage of proceedings, particularly where fundamental State prerogatives and interests are involved.

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[93] See US Counter-Memorial, pp. 117-118.

[94] ITLOS Cases Nos. 3 and 4, 27 August 1999; 38 *ILM*, p. 1624.

[95] B. Kwiatkowska, *Southern Bluefin Tuna*, 94 *AJIL*, p. 153.

[96] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, para. 289.

7.14. Now Germany has argued in an apparent attempt to avoid the non-mandatory character of the measures ordered by the Court in this case, that independent of any provisional measures ordered, the United States violated a general obligation to refrain from acts that might interfere with the subject-matter of a dispute while judicial proceedings are pending. We disagree. In proceeding with the execution of Walter LaGrand, the State of Arizona was carrying out the decision of its courts in accordance with Arizona law and judicial process. The execution had been ordered and scheduled long before Germany came to the Court; it was obviously not a measure taken for the purpose of disrupting the Court's proceedings or of depriving any parties before the Court of any rights or remedies. Under these circumstances, it cannot be the case that a State has an obligation to bring its criminal process to a halt in a particular case simply because a complaint demanding such a result is filed in an international tribunal. This would in effect give other States the power to impose a stay of execution or of other criminal process just by filing an application before this Court. This could not have been contemplated by the parties to the Vienna Convention[97].

7.15. Further, if applied generally, such a rule would radically transform the situation of parties to cases before this Court. For example, States using force in self-defence would be obliged to halt all further armed actions if their opponent filed a complaint alleging that such actions caused unlawful injury to its nationals, whether or not the Court had issued an order calling for such a result. States conducting fishing operations in disputed waters, or mineral exploitation in disputed territory, would be obliged to halt such operations for the duration of a case, whether or not the Court had asked them to do so. Under such a rule, States could use the Court to harass and impede other States, even if their cases were ultimately found to be without merit.

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[97] Germany also makes a similar argument in support of its assertion that the Court has inherent authority to issue legally binding provisional measures. The United States disagrees, for the reasons stated in the US Counter-Memorial.

The United States complied with the Order, in that it took every step reasonably available to it under the circumstances

7.16. Our second basic point is that, whatever the legal character of the Court's Order, the United States in fact complied with the Order, in that it took every step reasonably available to it, given the extreme circumstances in which it had to act.

7.17. Germany did not raise the question of a failure of consular notification with the United States until 22 February 1999. It did not file its Application and Request for the Indication of Provisional Measures until after business hours in the evening of 2 March, the day preceding the scheduled execution. As a result, the Court was unable to act on the German request until the evening of 3 March, and the Court's Order was received in the Office of the Legal Adviser of the State Department in Washington less than three hours before the time set for the execution.

7.18. Under these extreme circumstances, there was very little the United States Government could do in response to the Court's Order. Because of Germany's delay in raising the question of consular notification, United States government authorities had not even had time to carry out a thorough investigation of the facts, which is the normal predicate for any federal action with respect to the conduct of state criminal proceedings.

7.19. At the time the Court's Order was received, the Legal Adviser of the State Department, who was travelling with the Secretary of State in East Asia, was awakened and informed of the Order. The Legal Adviser's Office in Washington promptly took the action called for in the second paragraph of the Court's Order, namely to transmit a copy of the Order to the Governor of Arizona. A copy of the Order was also promptly provided to the Department of Justice and to the US Supreme Court, before whom motions concerning the case were then pending.

7.20. These actions constituted the only measures that could be taken by the US Government in the very short time available. Consequently, we maintain that the United States did in fact comply with the Court's Order, which called upon the United States to "take all measures at its disposal" to prevent the execution. Presumably this language did not include actions that were not at the disposal of the United States, such as actions that could not legally be taken within the US federal system or that were simply not feasible in the time available.

7.21. Germany has argued that the United States could have taken other steps to comply with the Court's Order. We disagree. None of the steps suggested by Germany were in fact at the disposal of the United States, given the character of the US federal system, the requirements of US law, and the extremely limited time available.

7.22. In particular, Germany has suggested that the Secretary of State might have written a letter to the Governor of Arizona asking for a stay of execution, as was done in the *Breard* case. With less than three hours available, and the relevant State Department officials in East Asia, this was simply not feasible. The request that was made to the Governor of Virginia in the *Breard* case was the product of days of consultation among the highest officials of the State Department and the Justice Department, since it raised very complex and serious concerns about the allocation of responsibilities between the state and federal governments, the degree to which the United States was in fact obligated or not obligated to act, the competence of the federal and state courts involved at that point, and the facts and history of the case itself. Indeed, in the *Breard* case, the consideration of these matters was much further advanced, because the Government of Paraguay had made timely approaches to the United States Government about the issue of consular notification and had filed with the Court in a much more timely manner.

7.23. Germany has suggested that the United States in fact encouraged the execution by reason of a letter sent to the Clerk of the US Supreme Court on the afternoon of 3 March by the US Solicitor General. That letter responded to a request from the Supreme Court for comment on the legal issues raised by motions filed that day by Germany for a stay of execution. The Solicitor General responded briefly and as best he could, while pointing out that he had not even had sufficient time to read thoroughly the materials filed with the motion. His conclusion was that, as a matter of US law and the prior decisions of the Supreme Court, the Vienna Convention did not form a basis for the requested stay of execution in the Supreme Court. This was based on his understanding of the lack of jurisdiction of US courts to hear the particular cause of action brought by Germany, in light of the previous holding of the Supreme Court in the *Breard* case that such relief was not available. This advice by the Solicitor General was honestly given and, we believe, it was correct. It cannot be a violation of international obligations, or the Order of the Court in this particular case, for the Justice Department to give honest and accurate advice to US courts concerning the state of US law.

7.24. In the course of his letter, the Solicitor General also briefly stated that the Court's Order was not legally binding. As I have already indicated, we believe this conclusion is correct. But, once again, it cannot be a violation of international obligations, or the Order of the Court in this particular case, for the Justice Department to give honest and accurate advice to US courts concerning the state of US international obligations. In effect, Germany argues that, to comply with the Court's Order, the United States was required to give legal advice to US courts which we did not then and do not now believe to be correct. Of course, we were not able to do so, and we do not believe that the Court's Order could be construed to suggest that we were expected to do so.

7.25. It has been suggested that a variety of other measures were available to the United States Government to prevent state governments like the Government of Arizona from executing foreign nationals who had not received consular notification, including the issuance of Executive Orders by the President, suit by the United States in federal court, and adoption by Congress of new legislation or amendment of existing legislation. Whatever the merits or problems of these various approaches from a constitutional or a policy point of view, it is obvious that none of these was even remotely available in the very brief period between the Court's Order and the scheduled execution of Walter LaGrand.

7.26. By the same token, the authorities of the State of Arizona were well aware that the US Government did not consider the Court's Order to be legally binding and that the US Supreme Court had dismissed the actions brought by Germany in US courts. The State of Arizona therefore had no reason to believe that it had any obligation to stay the execution of Walter LaGrand, which was scheduled to occur in less than three hours.

7.27. Accordingly, we maintain that the United States did act in a manner consistent with the Court's Order, in that it took all measures at its disposal under extremely limited circumstances. Therefore, even if the Court were to take the view that its Order created binding international obligations, we maintain that it would be inappropriate to hold that the United States violated any such obligations.

Given the German delay in bringing its request, it would be inappropriate to grant the relief requested by Germany

7.28. Our third basic point is that the unjustified delay of Germany in bringing its Request for Provisional Measures before the Court until the last possible moment makes it inappropriate to grant Germany's request for relief with respect to that Order.

7.29. As my colleagues have explained, Germany was aware since at least June 1992 that a question of compliance with the Vienna Convention existed with respect to Walter LaGrand. Germany was aware since at least 5 February 1999, of the date on which the State of Arizona intended to execute LaGrand.

7.30. Nonetheless, Germany chose not to file its Application and Request for the Indication of Provisional Measures until the evening of 2 March 1999, the day preceding the scheduled execution of Walter LaGrand. As a result, the Court was unable to act on the German request until the following evening. Because of the extraordinary timing of the German filing, the Court felt compelled to take the unprecedented step of acting without a hearing and without giving the United States an appropriate opportunity to present its views regarding the merits of the German request. The Court's Order indicating provisional measures was consequently issued in the evening of 3 March, and was received in Washington less than three hours before the time set for the execution.

7.31. This delay by Germany in raising the issue of consular notification and in filing its Application before the Court was unjustified. Germany now asserts two reasons for its delay. First, it claims that it did not act earlier because it only discovered on 23 February that certain Arizona officials knew at a relatively early point in the proceedings against LaGrand that he was a German national. With respect, this explanation is simply not adequate. As Attorney-General Napolitano confirmed this morning, the presentence reports containing this information were in fact available to Germany since 1992 and were made part of public federal court proceedings in 1993. They were the key documents bearing on the question of mitigation by reason of the circumstances of LaGrand's childhood and whether that issue was properly raised in the Arizona proceedings — a question that is at the heart of Germany's complaint. Germany's statement that it was not familiar with these documents is inconsistent with its claims about the vigour and thoroughness of its consular services. Obviously LaGrand's lawyers were familiar with these documents from the time they were issued.

7.32. Further, if it were true, as Germany argues, that the failure of consular notification constituted a fundamental deprivation of due process and seriously prejudiced the rights of its national, it is inexplicable that Germany delayed for years raising the issue of consular notification with the United States or filing its request before this Court, simply because it assertedly was not aware that certain Arizona officials may have known about the nationality of the individual at a particular stage in the process. If it were only this piece of information that caused Germany to raise the matter of consular notification with the US and to bring the matter to the Court, then surely the failure of timely consular notification could not have been a serious denial of fundamental rights, as Germany claims. Clearly this piece of information did not change the character of the obligations of the United States or the rights of Germany.

7.33. Germany also asserts that it delayed filing its case in this Court because it wanted first to exhaust all possibilities for clemency and for relief in US courts. But this is also not an adequate explanation, since Germany continued to pursue both clemency and US judicial remedies even after filing its Application in this Court. Since these domestic remedies are routinely pursued in capital cases right up to the last moment, this explanation by Germany would suggest that it would always be proper to withhold filing in this Court until the very last moment in such cases. Surely the Court should not accept such a chaotic and prejudicial procedure.

7.34. As Judge Schwebel stated in his separate opinion:

> "Germany could have brought its Application years ago, months ago, weeks ago, or days ago. Had it done so, the Court could have proceeded as it has proceeded since 1922 and held hearings on the request for provisional measures. But Germany waited until the eve of execution and then brought its Application and request for provisional measures, at the same time arguing that no time remained to hear the United States and that the Court should act *proprio motu*."[98]

As a result of the delay by Germany, the United States was seriously prejudiced in being unable to present its views on the substance of the German request, and in having essentially no time to act on the Court's Order. The Court was seriously prejudiced in being put in an impossible situation of choosing between ignoring the urgent situation pleaded by Germany, or in acting with virtually no time for reasonable consideration and in disregard of its consistent past practice in giving States an adequate opportunity to be heard.

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[98] *LaGrand Case (Germany v. United States of America), Request for the Indication of Provisional Measures, Order of 3 March 1999*, separate opinion of President Schwebel.

7.35. This German conduct makes it wholly inappropriate for the Court to respond favourably to the German request for a declaration that the United States violated an international legal obligation by failing to comply with the Court's Order. As the Court said in its Provisional Measures Order, "the sound administration of justice requires that a request for the indication of provisional measures . . . be submitted in good time . . ."[99]. A party seeking provisional measures should not be rewarded for its own inappropriate conduct in prejudicing the rights of the other party and in impairing both the Court's proceedings and compliance with its Orders.

7.36. In the recent case of *Yugoslavia* v. *Belgium*, Yugoslavia raised a new basis for jurisdiction for the first time at a late point in the oral proceedings. The Court pointed out that "such action, when not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice . . ."[100]. As a result, the Court appropriately refused even to consider the Yugoslav argument, even though this meant that no provisional measures were granted in a case where Yugoslavia had alleged they were necessary to prevent serious and immediate loss of life and economic damage.

7.37. In comparison, the effects of the timing of the German Application in the present case were even more prejudicial to the Court and the other party. Belgium at least had the opportunity to respond to the Yugoslav argument in open court later in the same day, with its full legal team present, having had a number of days to prepare on other aspects of the case. In contrast, the timing of the German Application effectively gave the United States no opportunity to address the merits of the German case prior to the Court's Order — no day in court, no time to bring its legal experts to The Hague, and no opportunity to prepare itself on any aspect of the case. Accordingly, as in the Belgian case, the Court should decline to give further relief to Germany on the basis of a request for provisional measures that was unjustifiably delayed, to the serious prejudice of the other party and the sound administration of justice.

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[99] *LaGrand Case (Germany* v. *United States of America), Request for the Indication of Provisional Measures,* 3 March 1999, para. 19.

[100] Case concerning *Legality of Use of Force (Yugoslavia* v. *Belgium), Request for the Indication of Provisional Measures, Order of 2 June 1999*, para. 44.

The Court can dispose of the merits of this case without any need to resolve this issue

7.38. Our final point is that the Court can fully and adequately dispose of the merits of this case without any need to resolve this issue about the effect of its Order indicating provisional measures.

7.39. Indeed, even though there have been many occasions in which States have not carried out various aspects of such Orders, the Court has not found it necessary or appropriate to give relief of the character sought by Germany in this case as a result. For example, as we explained in our Counter-Memorial[101], in the *Anglo-Iranian Oil Co.* case, the *Nuclear Tests* case, and the *Tehran Diplomatic Staff* case, the Court did not find it necessary or appropriate to grant further relief at the merits phase for the failure of one of the parties to carry out previous provisional measures orders, even though in each case the failure to carry out these measures went to the heart of the dispute and seriously prejudiced the interests of the other party. For reasons we have already indicated, the present case is certainly not an appropriate occasion for making new precedent on the question of remedies for failure to carry out provisional measures.

7.40. Further, in the present case, there is no substantive need or utility in revisiting the Court's Order. If the Court decides in favour of any of Germany's other requests for relief, it will have given Germany more than ample redress for the execution of Walter LaGrand, and further relief based on the provisional measures Order would be superfluous and without purpose. If, on the other hand, the Court decides against Germany's other requests for relief, it would be anomalous indeed for the Court to make the asserted violation of a provisional measures order the sole result of its decision on the merits.

Conclusion

7.41. Mr. President, in conclusion, we maintain that, whether or not the Court has the authority as a general matter to hand down binding provisional measures, in this particular case the measures indicated by the Court were — by their own terms — not binding in character. We suggest that, whatever the character of the Court's Order, the United States did in fact comply with it, in that it took every step reasonably available to it, given the extreme circumstances in which it had to act. We believe that the unjustified delay of Germany in bringing its request for provisional measures before the Court until the last possible moment make it inappropriate to grant Germany's request for relief with respect to the Order. And we have argued that the Court can fully and adequately dispose of the merits of the case without any need to resolve the general issue about the Court's authority.

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[101] See US Counter-Memorial, pp. 130-131.

7.42. If, contrary to these arguments, the Court believes that it must now decide the question of whether provisional measures are inherently binding, as a general matter under its Statute, then the United States reiterates and calls attention to the detailed arguments on this matter that are contained in our Counter-Memorial. However, we believe it is neither necessary nor appropriate for the Court to attempt to resolve this general issue in the present case. We believe that the Court can and should decline to grant the relief sought by Germany on the other grounds we have set forth.

7.43. Mr. President and distinguished Members of the Court, this concludes my presentation and I thank you for your attention to my presentation. I now suggest that the Court call upon the Agent of the United States, Mr. Thessin, to conclude the opening round of argument for the United States. Thank you, Sir.

The PRESIDENT: Thank you, Professor Matheson. I now call upon the Agent of the United States, Mr. Thessin.

Mr. THESSIN: Thank you, Mr. President. Professor Rosenne in his wisdom has reminded me that because the day has been very long I should be very short, and I will be.

Mr. President, this concludes the first round of the oral presentation of the United States in the *LaGrand* case. We appreciate very much the Court's courtesy and its attention to our presentations. We shall make the final submissions of the United States at the conclusion of our second round of the proceedings. Thank you.

The PRESIDENT: Thank you very much. Je donne maintenant la parole au juge Higgins qui souhaiterait poser une question aux parties. Judge Higgins.

Judge HIGGINS: Germany has explained to the Court the likely or probable course of action that would have been taken by its consular officials if the LaGrand brothers had been notified in timely fashion of their rights under the Consular Convention. I have in that respect the following questions for Germany:

(a) Do these submissions go to Germany's claim that it is entitled to a remedy other than an apology in respect of the LaGrands? Or is their purpose rather to suggest criteria for an appropriate remedy to be applied by the courts of the United States in reviewing any future violations of the rights of German nationals under the Consular Convention?

(b) Does the remedy called for in paragraph 4 of Germany's revised submissions, where there is reference to "future cases of detention or of criminal proceedings", include those persons that Germany claims are currently detained in the United States without having been informed without delay of their rights under the Consular Convention?

Le PRESIDENT : Je vous remercie. La question sera bien entendu fournie par écrit aux Parties.

Je crois que ceci met un terme à l'audience de ce jour. Je tiens à remercier chacune des Parties pour la qualité des exposés qui nous ont été présentés. La Cour se réunira à nouveau le jeudi 16 novembre, à 10 heures, pour entendre le second tour de plaidoiries de la République fédérale d'Allemagne, puis le vendredi 17 novembre à 14 heures pour entendre le second tour de plaidoiries des Etats-Unis d'Amérique. Chacune des Parties disposera à cet effet d'une durée maximale de trois heures, et n'est bien entendu pas dans l'obligation de l'utiliser. Je vous remercie beaucoup. La séance est levée.

L'audience est levée à 18 heures.

CR 2000/30

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2000

Public sitting

held on Thursday 16 November 2000, at 10 a.m., at the Peace Palace,

President Guillaume presiding

in the LaGrand Case
(Germany v. United States of America)

VERBATIM RECORD

ANNÉE 2000

Audience publique

tenue le jeudi 16 novembre 2000, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président

en l'affaire LaGrand
(Allemagne c. Etats Unis d'Amérique)

COMPTE RENDU

Present:	President	**Guillaume**
	Vice-President	**Shi**
	Judges	**Oda**
		Bedjaoui
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
	Registrar	**Couvreur**

The Government of the Federal Republic of Germany is represented by:

Mr. Gerhard Westdickenberg, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Eberhard U. B. von Puttkamer, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Bruno Simma, Professor of Public International Law at the University of Munich,

as Co-Agent and Counsel;

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and at the European University Institute in Florence,

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Hans-Peter Kaul, Head of the Public International Law Division, Federal Foreign Office,

Dr. Daniel Khan, University of Munich,

Dr. Andreas Paulus, University of Munich,

as Counsel;

Dr. Eberhard Desch, Federal Ministry of Justice,

Dr. S. Johannes Trommer, Embassy of the Federal Republic of Germany in the Netherlands,

Mr. Andreas Götze, Federal Foreign Office,

as Adviser;

Ms Fiona Sneddon,

as Assistant.

The Government of the United States of America is represented by:

Mr. James H. Thessin, Acting Legal Adviser, United States Department of State,

as Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

as Deputy Agents;

The Honourable Janet Napolitano, Attorney-General, State of Arizona,

Professor Michael J. Matheson, Professor of International Law, School of Advanced International Studies, Johns Hopkins University; former Acting Legal Adviser, United States Department of State,

Professor Theodor Meron, Counsellor on International Law, United States Department of State; Charles L. Denison Professor of International Law, New York University; Associate Member of the Institute of International Law,

Professor Stefan Trechsel, Professor of Criminal Law and Procedure, University of Zurich Faculty of Law,

as Counsel and Advocates;

Professor Shabtai Rosenne, Member of the Israel Bar; Honorary Member of the American Society of International Law; Member of the Institute of International Law,

Ms Norma B. Martens, Assistant Attorney-General, State of Arizona,

Mr. Paul J. McMurdie, Assistant Attorney-General, State of Arizona,

Mr. Robert J. Erickson, Principal Deputy Chief, Appellate Section, Criminal Division, United States Department of Justice,

Mr. Allen S. Weiner, Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

Ms Jessica R. Holmes, Attaché, Office of the Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

as Counsel.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte. Nous commençons aujourd'hui le deuxième tour de plaidoiries dans l'affaire *LaGrand (Allemagne c. Etats-Unis d'Amérique)* et je vais tout de suite donner la parole à l'agent de la République fédérale d'Allemagne, M. Westdickenberg.

Mr. WESTDICKENBERG:

I. OPENING REMARKS

Mr. President, distinguished Members of the Court,

1. This is the World Court. The eyes not only of our governments, of the scholars in academia are on these proceedings, but also of our citizens, of our public in general. However, Tuesday our United States friends somehow seemed to underestimate the authority of the Court, its eminent role in international law. They obviously tried

- an approach that relied on carrying the German arguments to the extreme so as to scare you, distinguished Judges, with a walk to the brink offering a glimpse into the abyss of legal extravagance;
- an approach that relied on exaggerations of German arguments as if we wanted to lead the Court onto the slippery slope of law-making as opposed to interpreting it;
- an approach that asserted facts and positions that did not correspond to what we had said.

2. Let me touch upon some of these *leitmotifs* that could be heard from the overture to the finale and which — to stay in this philharmonic vein — had too many *da capos* and wrong notes.

Their first movement: Germany would want you to rewrite the Vienna Convention. Far from it. Germany sees the Court as the "guardian of the Convention" and wants you to uphold it in letter and spirit. In Article 36, paragraph 1, the Convention states the obligations of States parties to inform foreign nationals about their individual right of consular assistance and all we want is to state that this obligation was violated by the United States. In Article 36, paragraph 2, the Convention states that all States parties to the Convention have to give the provisions of the Convention "full effect". All we are asking is to state that this obligation is rendered impossible by the procedural default rule in the United States and that the United States see to it that "full effect" be given to the provisions of the Convention. Abiding by the provisions of the Convention is not a favour granted to foreign nationals or their sending States; it is a legal obligation stemming directly from the application of the Vienna Convention.

Their second movement: Germany would — by asking the United States to give full effect — meddle with US domestic legislation. Far from it. Germany has shown that it is the very principle of procedural default that in cases like this one systematically leads to the violations of the Vienna Convention. All Germany is asking you as the "guardian of the Convention" is to oblige the United States to provide effective review of and remedies for criminal convictions impaired by it. How the United States is fulfilling that obligation — an obligation, I hasten to say, stemming from the Vienna Convention, thus international law — we are neither venturing to prescribe nor asking the Court to do so. We want to stick to the principle which I underlined already in my introductory statement: we are dealing with international law in this Court — nothing more, but also nothing less! After all, it is the United States that signed the Vienna Convention and thus took on the obligation to abide by its provisions. Whatever changes are required to its domestic legal system is a matter of the signatory State. To remind it of that obligation through a decision of this Court is not meddling with domestic legislation, it is just in line with the Optional Protocol I to the Vienna Convention to deal with "disputes arising out of the interpretation or application of the convention". I wonder how one could compare the implementation of exactly that task with using: "the Optional Protocol as a vacuum cleaner" — an expression coined by Professor Meron. On the other hand, isn't the United States using a "mixer" to continue with this metaphor of household appliances: mixing things up that by their very nature are separate?

The US's third movement: Germany would misuse the Vienna Convention in its campaign to abolish the death penalty. Far from it. Yes, Germany advocates the abolition of the death penalty, but this is not our intention before this Court. What more could we do than stress — as I already did in my introductory statement on Monday — that "this case is not on the death penalty in general or its application in any particular country!" However, we are dealing with what this Court designated in its annals as the *"LaGrand Case"* and it just so happens that — sad and regrettable as it is — the death penalty and execution of the LaGrand brothers are inseparably intertwined with the subject-matter of this case. Germany wants the Vienna Convention abided by in its very letter and spirit — just the opposite I would think from what any dictionary or law book would describe as "misuse".

Their fourth movement: Germany wants to lure the Court into a role where it would act as an appellate criminal court. Far from it. We want the Court to act in the very capacity foreseen by the Optional Protocol I — namely, to decide disputes arising out of the Vienna Convention, and not as an appellate Court.

Their fifth — and staying in line with this classical symphony — **and last movement: Germany would apply double standards: asking the United States to live up to standards Germany is not able or willing to abide by.** Far from it. As we will show Germany in its law and practice is in full compliance with the standards we expect from the United States. Let me unequivocally state: whatever the ruling of this Court may be, Germany will abide by its letter and spirit. And I invite the Court to take us at our word! Thus, for example, if there were a decision by a German court that were impaired by a violation of the Vienna Convention, naturally there is a remedy foreseen in German procedural law; we do not have to create it to fulfil obligations from the Vienna Convention: Section 337, paragraph 2, of the German Code of Criminal Procedure foresees a ground of appeal if a legal norm — including a norm of international law — is not applied at all or is incorrectly applied and if there is the possibility — no direct causation required — that the decision was impaired by this fact. A similar provision in US law would have made it possible for the LaGrand brothers to raise the violation of the Vienna Convention before US federal courts.

3. I would like to take up a line of argumentation that was put forward by Professor Trechsel on Tuesday, namely a systematic intention to oppose human rights to commitments made by States. He turned every single human right into a "fundamental right" which is simply restated in international conventions. This seems to me an "objectivist", if not simply a "natural law" concept of human rights which on face value sounds generous, but which in reality does not correspond to the reality of positive law. Human rights flow, in the first place, from international conventions voluntarily concluded between sovereign States. One therefore cannot create an artificial contrast between State obligations laid down in conventions and human rights.

4. Let me also address four points — only four exemplary ones for reasons of time — in the US pleading on Tuesday that clearly misrepresent German positions or assertions. I regret that I have to use your time on this, but for the record I did not want to let this stand without correction, lest I am accused of ceding these points.

First, Germany has not asked for absolute guarantees that mistaken violations of the Vienna Convention do not occur. We are not asking the impossible: we know that human errors occur and will occur again. However, we also thought that we had not to exclude the obvious. For those who are in need of explanation: we ask for assurances that the United States will redress the still prevailing situation of a consistent and widespread neglect of the Vienna Convention by United States law enforcement agencies — a situation acknowledged by the stepped-up US efforts to publicize those obligations under the Vienna Convention, a situation that, however, is not yet redressed as we have shown by the number of violations of the Vienna Convention exactly since those efforts were stepped up.

Second, Germany has not asked for an automatic nullification of impaired decisions — as Professor Trechsel implied Tuesday afternoon. It seems sufficient to refer to Professor Simma's pleading on Monday: all we ask for is the provision of effective review of and remedies for criminal convictions.

Third, Germany did not limit its demands on death penalty cases, but did emphasize these cases because of their irreversible nature.

Fourth, Germany did not ask the United States to do that what it simply cannot do due to its federal system. Let me ask you, Mr. President and distinguished Members of the Court: Do we learn here of a new principle of international law — namely, that a federal constitution lets a State opt out of its treaty obligations?

5. Mr. President, distinguished Members of the Court, I had almost forgotten to briefly take up two points which the Respondent brought up in documents submitted to us on 13 November respectively on 14 November 2000 and which do not serve the purpose they obviously are supposed to, namely to discredit German preparedness in general as far as consular assistance is concerned :

- First, the affidavit (document No. 1 of 13 November 2000), dated 2 November 2000, by Mr. Villareal, a former defence attorney of Mr. Michael Apelt, a German national sentenced to death together with his brother for murder in the State of Arizona. In the affidavit Mr. Villareal claims that the German Government was not interested in getting involved before all legal remedies were exhausted and that the financial assistance sought was refused by the German Government. Let me officially represent here — after having enquired with the responsible officer of the German Federal Foreign Office in Berlin — that, together, the German Federal Government and the Government of a German *Land* have so far in the course of the still ongoing appeal proceedings in the case *Apelt* disbursed more than DM 100,000 for projects assisting the Apelt brothers' defence, in particular concerning research for mitigating evidence in Germany on their youth.
- Secondly, as far as the letter (document No. 1 of 14 November 2000) of the German Consul to Mr. Richard Bozich, a former private investigator for Karl LaGrand, of 17 March 1993 is concerned, let it suffice to say that the Consul's question of in how far the German nationality "is crucial for the defence strategy" of Karl LaGrand is easily explained by the fact that Mr. Bozich was not the defence counsel responsible for defence strategy, but simply the investigator. In addition: at this moment nationality could only play a role in so far as a possible political intervention is concerned — against the background that in that case of the Apelt brothers the question of violation of Article 36 of the Vienna Convention was never raised; in so far as the question aims at a political intervention and does not express doubt about the necessity of assisting a German national.

6. Concluding my opening remarks in the second round, let me again state our main arguments which stay unchanged because Tuesday's pleading by the United States gives us no reason to change its main thrust — as ably as our friends on the side of the Respondent argued their case.

- We have come to you, Mr. President and distinguished Members of the Court, to obtain your decision clarifying important principles of international law arising out of the Vienna Convention and of the Statute and Rules of this Court, as far as the binding quality of your Orders on provisional measures is concerned.

— We have seen the LaGrand brothers deprived of their rights under Article 36 of the Vienna Convention because they were only informed about their rights on consular protection by the US authorities more than 16 years after their arrest and because they were deprived of the possibility of raising this violation of their right by the principle of procedural default. US authorities, whose acknowledged fault it was that the LaGrands were informed too late, turn this against them, saying that they could have only raised the matter earlier.

— Similarly, as far as the Order is concerned, United States authorities disregarded what the Court asked them to do, but rather preferred to continue on a path it had previously chosen — the execution, as if after more than 17 years after the arrest a stay of execution for days or months were impossible: as if the short time between Order and execution — the three hours referred to repeatedly on Tuesday — were an immutable law of physics and could not be extended: it was at the discretion of the Governor of Arizona to do so, but also other authorities at the federal level could have acted! International law — that means the Statute and Rules of this Court — and respect to this highest judicial organ of the United Nations, the International Court of Justice, demand that decisions of the Court are not rendered meaningless by actions of one party prior to that final decision.

— Even though the origins of this case trace back to the LaGrand brothers who were executed more than a year ago, we attach great significance to your ruling as far as German nationals in the United States, but also as far as citizens abroad from all countries party to the Vienna Convention are concerned. For the Vienna Convention on Consular Relations is an important pillar for the protection of foreigners abroad.

Germany, trusting in this Court, confidently awaits your decision, to which it attaches the greatest significance and by which it will abide faithfully.

Mr. President, distinguished Members of the Court, I thank you for your attention and ask you to call on Professor Bruno Simma to continue the German pleading. Thank you.

The PRESIDENT: Thank you very much, Mr. Westdickenberg. Je donne maintenant la parole au professeur Bruno Simma.

Mr. SIMMA: Merci, Monsieur le président. Thank you, Mr. President, for giving me the floor this morning.

II. JURISDICTION AND ADMISSIBILITY

1. Let me first address the issue of jurisdiction and admissibility. On Tuesday, counsel for the United States recalled, as Germany had already done on Monday, that the jurisdiction of this Court is always a limited one. There is also agreement between the parties that our case finds its jurisdictional basis solely in Article I of the Optional Protocol. This provision covers "[d]isputes arising out of the interpretation or application of [this very] Convention". Everything else — and here again we cannot but agree with the US Agent[1] — is outside the jurisdiction of the Court. What does undeniably remain, however, is a dispute concerning the correct understanding of the scope of this jurisdictional clause.

2. Contrary to the announcement made by the Agent of the United States, it was not only Professor Meron who dealt with questions of the competence of this Court. Rather, the issues of jurisdiction and admissibility went like a red thread throughout the whole US presentation and sometimes appeared at unexpected places, that is, among questions clearly belonging to the merits of our case. This fact and the rather light-handed manner in which statements with potentially far-reaching consequences were sometimes made does not facilitate our task this morning. Let me by way of example refer to Mr. Thessin's statement according to which the case "has been resolved by the United States apology and appropriate assurances of non-repetition, making the case in that sense moot". Mr. President, if one party has asked for certain remedies and the other party is only willing to concede, or has already offered, less, this is certainly a core question of the merits, and has nothing — I repeat, nothing — to do with "mootness" in the technical sense, or in any other possible sense.

3. The central allegation of Professor Meron was, as our Agent has already mentioned, that Germany used the "Optional Protocol [as a] giant vacuum cleaner which sweeps up every allegation of fact or law, whether or not it has anything to do with the interpretation or application

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[1] CR 2000/28, para. 1.5.

of the Convention, however remote and however weak the evidence and its basis in law"[2]. Mr. President, this statement not only distorts our submissions but also reveals an understanding of the scope of the Optional Protocol's jurisdictional clause which is far too narrow and thus entirely untenable.

4. In this regard, Professor Meron's invitation to look at page 1209 of Professor Rosenne's *magnum opus*[3] was very helpful indeed. The leading case cited there on our issue is this Court's Judgment in the *Ambatielos* case in which we read:

> "The Court must determine . . . whether the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty. It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886. On the other hand, it is not necessary for that Government to show, for the present purposes, that an alleged treaty violation has an unassailable legal basis . . .
>
> [I]f it is made to appear that the Hellenic Government is relying upon an arguable construction of the Treaty, that is to say, a construction which can be defended, whether or not it ultimately prevails, then there are reasonable grounds for concluding that its claim is based on the Treaty."

5. We submit — and I hope we have made this sufficiently clear, both in our Memorial and in our oral presentation — that the German reading of Article 36 of the Vienna Convention and the consequences arising out of its violations is based on "an arguable construction of the treaty" — to use the terms of the *Ambatielos* finding. Nothing more is required in order to answer the question of jurisdiction in the affirmative.

6. Further, we should keep sight of the fact that the jurisdictional clause on which we rely is not confined to "the interpretation or application of the Convention" but expressly refers to "disputes arising" about these matters. What this means is, that the Court is not limited to a quasi-"advisory" function concerning the understanding of the rules of the Vienna Convention but is called upon to decide contentious cases "*arising out* of the interpretation or application" of it. This is precisely what we have before us with regard to all the claims put forward by Germany. On the basis of the Optional Protocol, this Court cannot address mere abstract or hypothetical questions concerning the Vienna Convention, its competence presupposes a concrete dispute. In

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[2] CR 2000/28, para. 3.6.

[3] Shabtai Rosenne, *The Law and Practice of the International, 1920-1996* (3d. ed., Vol. III — Procedure).

our specific case, this dispute unfortunately involves the death penalty. We simply cannot avoid this topic in framing the issues for the decision of this Court. But, what is at the heart of our dispute is Article 36 of the Vienna Convention as such. The question of the implementation of this provision necessarily involves an assessment of laws and practices within the United States domestic legal system but only from the perspective of international legal requirements. The allegation that Germany attempts to turn this Court into an unauthorized overseer of US law and as a sort of court of criminal appeal implies a thorough — and of course deliberate — misunderstanding of Germany's submissions as well as of the scope of the Optional Protocol.

7. A topic on which my colleague, Professor Meron, laid special emphasis was the issue of diplomatic protection. Let me make it clear from the outset, Mr. President, that this issue enters the picture only through the intermediary of the Vienna Convention. What we request this Court to do is to find that Article 36 not only establishes rights and obligations between States but also gives rise to rights of individuals. If one was to follow this view, a dispute arising out of the interpretation of Article 36 necessarily encompasses a dispute about whether or not Germany is entitled to grant its nationals diplomatic protection. Hence, diplomatic protection does not stand alone, isolated, as Professor Meron wants you to believe, but is closely and insolubly linked to the dispute over the correct interpretation of the Convention. In other words, if, as Germany submits, Article 36 contains individual rights, Germany's right to diplomatic protection will be the necessary corollary. If, on the other hand, the US view were to prevail, the issue of diplomatic protection would inevitably evaporate. What this proves is that the controversy whether in our case, a right of Germany to diplomatic protection exists, clearly is a "dispute arising out of the interpretation of the Vienna Convention".

8. Counsel for the United States further argued that "the requirement of exhaustion of local remedies would bar further consideration of ... claims [of diplomatic protection]". Professor Meron then questioned the German assertion that all remedies available to the LaGrands in the United States had been exhausted, because "remedies *are* available prior to conviction by jury and at the state level"[4]. Let me once again recall the undisputed facts of this case:

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[4] CR 2000/28, para. 3.24.

US authorities failed to inform Karl and Walter LaGrand of their rights under the Consular Convention and they themselves were not aware of these rights well beyond the time when the jury trial and other (appellate) proceedings at the state level had been concluded. Mr. President, the essential element of the rule of exhaustion of local remedies was in our view correctly described by Belgian counsel in the *Barcelona Traction* case in the following words: «*[p]our pouvoir entrer en ligne de compte dans la vérification de la conduite de la personne lésée, les recours doivent lui avoir été effectivement* accessible». And the requirement of "accessibility" was then explained as follows:

> «*La première condition, à savoir* l'accessibilité *des recours envisagés ... est dictée par le bon sens. Comme l'indique la sagesse populaire, «à l'impossible nul n'est tenu». Un recours inaccessible doit donc être assimilé à un recours inexistant et on ne pourra opposer à l'action d'un État l'inaction de son ressortissant lorsque celle-ci est due à une force majeure,* a fortiori *lorsque l'impossibilité a été due à l'attitude des autorités de l'Etat défendeur.*»

And the statement goes on: «*L'accessibilité du recours, c'est la possibilité juridique et matérielle pour la victime d'y avoir recours.*»[5]

9. I submit, that this statement perfectly represents the generally recognized law on the matter; confirmed by the jurisprudence of this Court and its predecessor, by legal writing, and finally also by the new ILC draft Article 45 *(b)* on State Responsibility[6] which specifies the local remedies to be exhausted as "any available and effective local remedy . . .". Could any statement better match the particular circumstances of our present case in which it was precisely the conduct of the United States itself which prevented the LaGrands from raising the issue of consular notification at a sufficiently early stage of their criminal proceedings? Without spending more time on this obvious point, it is clear that in our case there existed no remedy that was open to the LaGrands and which they failed to employ, to paraphrase the holding of this Court in the *ELSI* case.[7] Amerasinghe sums up the situation as follows:

> "[A]vailability entailed not only that the remedy be accessible to the particular individual affected, if such remedy existed, but also that that remedy be available as a possible remedy in the specific context of the individual's case."[8]

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[5] Cited after C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge 1990), at p. 153.

[6] Text reproduced in United Nations doc. A/55/10 at p. 136.

[7] Case concerning *Elettronica Sicula S.p.A (ELSI), I.C.J. Reports 1989*, p. 47.

[8] C. F. Amerasinghe, *op. cit.* p. 154.

As to Professor Meron's assertion that the LaGrands did not exhaust local remedies because they did not claim their right, a right about which they had not been informed, I find it disturbing, to put it mildly. It amounts to saying: you did not exhaust local remedies because you did not raise a point that you did not know about because the authority which is going to put you to death has not informed you in breach of international law — a remarkable statement.

III. ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

1. Mr. President, let me now turn to the interpretation of Article 36 of the Vienna Convention. The Respondent has presented us with a restrictive and incorrect reading of Article 36 in this regard. Let me first, therefore, once again explain the system of consular assistance that is embodied in Article 36, paragraph 1. Second, I will argue that the rights under Article 36, paragraph 1, are individual and human rights. Third, I will address the violation of Article 36 by the application of rules of US domestic law which do not give full effect to the rights under Article 36, paragraph 1.

2. Counsel for the United States wants you to believe that Article 36 does not constitute a coherent and comprehensive régime. In the US view, Article 36 is a bag full of isolated rights with no apparent connection and no relevance whatsoever for criminal proceedings. Such a description does not only underestimate the drafters of the Convention, but also the result of their work. In reality, both the right to communication between consul and the foreign national and the right to consular assistance in criminal and other procedures are embodied in Article 36.

3. Article 36 sets up a coherent régime in which providing information to the detainee of his right to notification plays an essential role for the effectiveness of the whole provision. The rights do not only concern the consul or the sending State, but first and foremost the foreigner himself. First, Article 36, subparagraph 1 *(a)*, does not only regard the communication and access of consular officers to nationals, but operates also vice versa. The order of these two sentences is certainly less important than the substance of the rights embodied in that subparagraph. Second, Article 36, subparagraph 1 *(b)*, does not only cover arrests, but also mentions, in words of one syllable, the trial following an arrest. On Tuesday, Professor Trechsel argued that applying Article 36, subparagraph 1 *(b)*, to the detention and trial of foreign nationals would amount to a

«traitement préférentiel» of an arrestee as compared to a suspect at liberty[9]. But this turns the purpose of this subparagraph on its head. Is the situation of a person at liberty really inferior to that of an arrestee? While a person who is detained is unable to receive outside support without the help of State officials, a person at liberty is in a position to freely prepare for his defence and to contact whomever he pleases. Third, Article 36, subparagraph 1 *(c)*, explicitly covers arrangements of legal representation. Counsel for the United States has argued that legal representation of any standard would conform to the meaning and purpose of this subparagraph[10]. Such a view not only disregards the "appropriateness" of the legal representation which is expressly prescribed by Article 5, subparagraph (i), of the Vienna Convention on Consular Relations. It would also allow any State to circumvent that provision by appointing a convenient lawyer — convenient to the State, not to the individual. I am convinced that Ms Brown, an eminent practitioner of the Vienna Convention as she is, would certainly not accept such a proposition if advanced by Germany as against a US citizen. Again, the extremely narrow reading suggested by the Respondent deprives the rights embodied in Article 36 of most of their practical meaning. Fourth, the US argument disregards the structure of Article 36. On the one hand, Article 36 provides for the right of the detainee to information about his rights. On the other, it contains the right of the consulate to assist its nationals. For the effective exercise of his right to communication at all times, informing the foreigner about his rights is absolutely essential. Only if he is informed can he request notification and, in the future, benefit from freedom of communication with and access to the consulate. Only if seen in that systematic correlation do the rights embodied in Article 36 become meaningful and effective, as is expressly required in Article 36, paragraph 2.

4. Both Professor Trechsel and Ms Brown claimed that the German argument on Article 36 providing individual rights was contradicted by the right of a State to refuse communication with its nationals. But this argument confuses the right of the individual towards the receiving State with the right of a national towards his own State. Whereas the first point is a matter of

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[9] CR 2000/29, para. 6.47.

[10] CR 2000/28, para. 4.25.

international law, the latter is left to domestic law. For instance, according to German law German nationals do have a right to receive assistance from their consulate.

5. Let me now turn to Professor Trechsel's attack against the human rights dimension of Article 36. As a preliminary point let me say that I am familiar with — not to say, sick and tired of — arguments like that of the alleged "inflation of human rights" not only on the basis of my academic work but due to my ten years of practical experience as a member of the United Nations Committee on Economic, Social and Cultural Rights — a category of human rights which is generally thought of, countered or opposed by that very argument. Putting forward such an argument is usually the first step of disqualifying unwanted candidates for human rights status by proceeding from what I would call a "fundamentalist" — or western fundamentalist — conception of such rights. On a more personal note, I find it sad to listen to an eminent human rights lawyer from a region of the world where the death penalty has been abolished and where the situation in which the brothers LaGrand found themselves trapped, cannot occur, attempting to deconstruct the legal view of a human rights court in another region of the world where the situation is extremely virulent. I will be very frank: I consider this is an attempt by our distinguished opponents to appease the conscience of this Court by suggesting that one can very well reject the view of the Inter-American Court as to the human rights dimensions of Article 36, without the risk of being opposed to human rights in general. I have nothing against human rights: some of my best friends, the European Convention rights, are human rights.

6. Returning to Professor Trechsel's "fundamentalist" philosophy of human rights, the very abstractness, even aloofness, of such a purely naturalist conception of such rights deprives them of their most important feature, namely that of belonging to real people in everyday situations. In this sense, a closer look at contemporary human rights law will reveal many instances in which human rights refer to groups in need of particular protection such as migrant workers, the elderly, women, children, or human beings in developing countries. Does Professor Trechsel really want to suggest that these rights are not "human rights" in the proper sense of the term? If United Nations efforts in human rights law-making had been based on such a concept, they would have gone nowhere.

7. Regarding rights of foreigners, a famous saying has it that every human being is a foreigner, almost everywhere — except, of course, in his own country. For instance, almost all of

us in this courtroom, and, with one exception, all of the judges on the bench, are foreigners here, enjoying the hospitality of the Netherlands. And again, that absolutist view reveals itself as a fundamentally flawed and unrealistic conception. Germany therefore proposes that we look at the law in force, in particular at the text of Article 36, to find out whether it gives rise to individual human rights or rights of States. By the way, the distinction between "inter-State" relations and human rights does not correspond to the current stage of international law and international human rights law. Rather, human rights today are embodied in inter-State conventions and they are part and parcel of contemporary international relations.

8. As we have demonstrated both in our written and oral pleadings, a state-of-the-art interpretation clearly shows that Article 36 does contain individual rights. Indeed, as the *travaux* reveal, it was the intention of the drafters not to impose consular assistance on the foreigner but to make consular support dependent on the individual's willingness to be supported — which, in turn, means that it is his rights which are at stake, and, at least primarily, not those of the State involved. Thus, at several instances counsel for the United States' choice of words shows that they, also, were not capable of speaking of the rights under Article 36 without referring to the rights of individual foreign nationals. For instance, Ms Brown herself spoke of "the right referred to in paragraph 1, . . . the right of the consular officer and the foreign national to communicate with and have access to each other . . ." and of "the right of the foreign national to have his consular official notified of his detention and to have his communication forwarded"[11]. This very impossibility of speaking on Article 36 without speaking about the rights of foreigners is convincing testimony to the proposition that it does embody such rights — at least if one sticks to the text of the Convention instead of following a flawed and abstract concept of what individual and human rights should look like. In an analogy to the famous Humpty Dumpty, does the United States have the right to define "rights" differently from the rest of the world?

9. The "human rights" dimension of Article 36 was far from being alien to the drafters of the Convention, some 40 years ago. As we have shown in our Memorial, the *travaux* are replete with references to the connection between human rights and the right to consular notification. To cite

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[11] CR 2000/28, para. 4.26.

only one example, in the words of the Greek delegate to the Conference, Mr. Spyridakis, the 1963 Vienna Conference "was also following the present-day trend of promoting and protecting human rights, for which future generations would be grateful"[12]. Let me mention at this point that, through a happy coincidence I would say, the German and the United States legal teams found themselves put up in the same hotel, and this gave me the opportunity this morning over breakfast to discuss with Ms Brown the interpretation of the meaning of the word "academician" which she had used in her presentation, because I was going to make a little remark about that, for instance calling Mr. Spyridakis as far as I know not having been a mere academician. But Ms Brown clarified the meaning of the term "academician" in such a charming and disarming way that I am going to desist from these remarks, maybe with one little exception a little later.

10. To return to my argument about human rights, this dimension of Article 36 is not some kind of claim "made up" by Germany but the expression of a development already taken into account by the negotiators of the Vienna Convention. Germany does not share the dismissive attitude towards both the United Nations General Assembly and the Inter-American Court of Human Rights expressed by counsel for the Respondent. It is of course correct — and Germany has never suggested otherwise — that the United Nations Declaration on the rights of aliens of 1985 does not expressly mention the right embodied in Article 36, subparagraph 1 *(b)*. But, regarding the widespread ratification and application of the Consular Convention, it seems obvious to me that, by referring to the right to communication "at any time", that is, also when a foreigner is arrested or detained, the General Assembly referred to the whole panoply of rights embodied in Article 36, and not only to subparagraph 1 *(a)*. There was simply no need to restate all of these rights in detail, because they were already recognized in the Vienna Convention of 22 years ago. Nevertheless, the United Nations Declaration does clarify that we are here in the presence of a human right of foreigners, and of course we share the view of this Court expressed in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, that General Assembly resolutions "can . . . provide evidence important for establishing the existence of a rule or the

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[12] *United Nations Conference on Consular Relations, Official Records*, Vol. I, United Nations doc. A/Conf.25/16, p. 339 (para. 13).

emergence of an *opinio juris*"[13]. This is especially true of a solemn General Assembly declaration like ours, adopted by consensus.

11. As I have already implied, it is strange that Professor Trechsel has invoked the jurisprudence of the European Court in a case dealing with the observance of individual rights in the United States. This deference to the regional European Court stands in marked contrast to his outright rejection of the Advisory Opinion of the Inter-American Court of Human Rights. A close analysis of the entire barrage of Strasbourg judgments fired at this Court by Professor Trechsel would show that none of these judgments is anything like as relevant to the problem before you, Mr. President, as is the Advisory Opinion of the Inter-American Court. But for understandable reasons, this Opinion is not supported by the United States. Such a selective approach to human rights seems particularly misplaced before this Court, whose jurisdiction is truly worldwide. I will not repeat the extensive citations that we put forward from the Opinion of the Inter-American Court. We are confident that this Court will have a more balanced view on the impact of the jurisprudence of regional human rights courts on this case than that displayed by our Respondent. Needless to say, the most truly universal human rights body, the United Nations Human Rights Commission, in its recent resolution on the question of the death penalty, has urged

> "all States that still maintain the death penalty . . . to observe the safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under the Vienna Convention"[14].

12. The character of the safeguards contained in Article 36, paragraph 1, also sheds light on the meaning of Article 36, paragraph 2, in so far as this provision requires internal laws and regulations to conform with the rights under paragraph 1. No human rights lawyer worthy of that name would accept the proposition that effectiveness of human rights provisions can be achieved without remedies for their violation. Only then can the individual benefit from his rights instead of being at the mercy of State authorities.

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[13] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 254 (para. 79). See also ICTY, *Prosecutor* v. *Furundzija*, Judgment of 10 December 1998, Case No. IT-95-17/1-T (1998), reprinted in: 38 *International Legal Materials* (1999), p. 317, at p. 351 (para. 160). For an extensive [?]

[14] United Nations doc. E/CN.4/RES/2000/65, para. 3.

13. As we explained at length on Monday, the impact of paragraph 2 of Article 36 on our case is twofold: first, it clarifies that domestic law falls well within the ambit of and is subject to the rights under paragraph 1. Second, it makes clear that the rights under paragraph 1 must be effectively implemented by domestic law. It is understandable that Mr. Mathias tries to counter Germany's argument on the proviso by referring to the first part of Article 36. But notwithstanding the fact that paragraph 2 begins with the relevance of national law, the yardstick for domestic law in this regard is to be the effectiveness of the international law embodied in Article 36, that is the rights accorded to foreigners. In Germany's understanding, this clearly implies that there needs to be a means by which the injury to the defendant caused by the violations of his rights can be remedied at the domestic level. Otherwise, consular information simply does not amount to an effective right as required by Article 36, paragraph 1, but remains subject to the whims of the receiving State.

14. This has nothing to do with the United States argument that Article 36 does not deal specifically with "defences in criminal cases". But the provision unequivocally deal with the rights of foreigners to consular access and information and the effective implementation of these rights by domestic law. These rights are the domestic criteria, not any list of matters of domestic law covered by the provision. In a quite — this is what remains of my intention Ms Brown — unacademic remark about the *travaux*, that is, one unaccompanied by any references, counsel for the United States spoke of "the considerable unease that the delegates felt about the fact that the changes that were being informed referred to individuals and their rights". Unlike US counsel, I do not pretend to be able to read the minds of the delegates of 40 years ago; I just can't.

15. The other day, counsel for the United States argued that none of the rights under Article 36, paragraph 1, were violated by the application of the rule of procedural default. Such a statement simply glosses over the fact that without a remedy in case of its violation, a right to information is meaningless and not effective, contrary to the express requirement contained in the proviso in paragraph 2. In the view of the United States, paragraph 2 would add nothing to paragraph 1. But at this point, it simply remains for me to state that the Applicant and the Respondent continue to disagree deeply and sharply on this point.

16. On Tuesday, Ms Brown suggested that practitioners view Article 36 in a different way. Emphasis was put on the impossibility of perfect compliance with Article 36. Following that pattern, would counsel also argue that speed-limits on interstate highways in the United States, on the German autobahn — there indeed exists speed-limits on the German autobahn — or on British motorways are of little judicial relevance just because every day thousands of drivers risk their lives speeding? Did the Respondent really want us to believe that Article 36 was some sort of, maybe newly conceived, soft law of little relevance for the detainee? Let me be clear on this point: the Vienna Convention has been accepted by the vast majority of States around the world, and is a solid part of existing international law. Statistics of compliance and the content and substance of an obligation are two different matters. Nothing that Germany has advanced here requires more than compliance, or, at least, a system in place which does not automatically reproduce violation after violation of the Vienna Convention, only interrupted by the apologies of the United States Government.

17. Mr. President, I would now like to ask you to call on Mr. Kaul to explain State practice regarding the implementation of Article 36, in particular German practice. Merci Monsieur le président.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Je donne maintenant la parole à M. Kaul.

Mr. KAUL: Merci, Monsieur le président.

IV. STATE PRACTICE WITH REGARD TO ARTICLE 36 OF THE VIENNA CONVENTION

1. Mr. President, Germany will now once more show why State practice cannot support nor justify the conduct of the United States in the case of the LaGrand brothers and that State practice cannot support the underlying restrictive and incorrect interpretation of Article 36 of the Vienna Convention by the Respondent.

In passing, let me mention that my remarks on State practice do not come from an academician but from a practitioner of consular law who has done consular work in the German embassies in Oslo, Tel Aviv and also Washington.

2. With regard to State practice, Ms Brown on Tuesday ventured to put before this Court a quite far-reaching and categoric statement. She said "the prevailing practice of the over 165 countries now party to the Vienna Consular Convention overwhelmingly supports our position". This is obviously a further but very accentuated repetition of the ancillary argument contained in the Counter-Memorial that "State practice including Germany's own practice conflicts with Germany's claim"[15]. Ms Brown also found it appropriate to state — incorrectly — that "Germany yesterday did not contest" the US view and that "Germany seems prepared to concede on this point".

3. Needless to say this is simply wrong. But before showing once more that arguments on State practice cannot support or justify the US position in this case, let me make a general remark: this is not a seminar concerning State practice on the Vienna Convention on Consular Relations. We absolutely must retain our focus on the fundamental facts and legal principles decisive for the concrete case of the LaGrand brothers before this Court. This case concerns the unresolved dispute between the United States and Germany arising out of the application of the Vienna Convention, this in a case in which the Respondent once again chose to deliberately ignore a sustained and grave violation of the right to consular assistance before putting two German nationals to death. As in the case of Mr. Breard, the LaGrand brothers, Mr. Faulder and Mr. Flores, executed just a week ago, State practice by the Respondent seems *de facto* to: "violate Article 36, ignore the violation in the criminal proceedings, refuse to impact the violation for the imposition of the death penalty, execute and apologize as usual".

The concrete question before the Court is whether such a practice is indeed in accordance with the Vienna Convention, whether such a practice is in line with the specific obligation to give full effect to the rights accorded under Article 36, and whether "the prevailing practice of the over 165 countries now party to the Vienna Consular Convention really overwhelmingly supports" such an approach.

4. In light of the one-sided and misleading US arguments on State practice, we were, at first, tempted to react by saying: *"si tacuisses philosophus mansisses"*. But given these arguments

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[15] Counter-Memorial, footnote, paras. 91-94.

Mr. President, Germany finds it necessary to bring some order into this mish-mash of argumentation in which chalk is equated to cheese, — in which State practice is reduced to the notion of consular practice, — in which no appropriate differentiation is made between minor and grave cases, between consular practice, judicial and legislative practice of States, — in which this practice is presented in a one-sided and selective way and — in which — most importantly — the Respondent again generously ignores the fact that there is simply no State practice with regard to the question, the decisive question, at hand, namely whether imposition of the death penalty impaired by a serious violation of the right to consular assistance should be open to some kind of review or not.

We are of course aware that the Order of this Court of 9 October 1998 in the case of Mr. Breard and the Advisory Opinion of the Inter-American Court of Human Rights deal specifically with these issues, and that they are the only specific sources of jurisprudence available from international courts to date.

5. Mr. President, the United States is in general correct that in their consular practice, in the proper and narrower sense of the word, most States seem to follow the practice of investigating, apologizing, if appropriate, and undertaking to improve future compliance, when allegations of violations of Article 36 occur between governments. Germany also noted on Tuesday that most violations of Article 36 happen in minor cases. Germany, on its part, does not question that in the majority of such cases the practice of investigating and apologizing may continue to be appropriate.

6. But, Mr. President, does this justify in the concrete case of the LaGrand brothers before this Court the assertion, stunning assertion indeed, that "prevailing practice of the over 165 countries party to the Vienna Convention overwhelmingly supports" the US position? Germany suggests that here we have to be more precise. In our view, this US assertion would only be correct if the answer to the following two precise questions were to be clearly in the affirmative:

- First, does State practice, including the judicial and legislative practice of States, support the US view that violations of the Vienna Convention are irrelevant for national criminal proceedings? That convictions impaired by such a violation cannot be open to some kind of review with regard to the impact of such violations?

— Second, and more specifically: does State practice support the US view that violations of the Vienna Convention are irrelevant with regard to the imposition and execution of the death penalty? That imposition of the death penalty impaired by a violation of the right to consular assistance is not and cannot be open to some kind of review?

Needless to say, Mr. President, the answer to both these questions is from our side a very clear "No".

7. First: With regard to existing judicial practice relating to the failure to inform a foreign national about his right to consular assistance, such practice is rare and largely inconclusive. For example, an Australian case, the *Abbrederis* case, only deals with the admission of evidence, not with the lack of consular notification during the whole trial[16]. In an Italian case, the *Yater* case, the Court denied a reversal of a criminal judgment due to a violation of Article 36. However, in the case the defendant had an attorney of his own choice and not a court-appointed lawyer; and of course the case did not concern the pronouncement of the death penalty[17]. On the other hand, two British Crown Court cases suggest that a violation of Article 36 may indeed lead to the reversal of a judgment based on evidence impaired by the violation[18]. The United States Ninth Circuit Court, considering provisions of US administrative procedure similar to Article 36, decided that a violation of those provisions in certain cases requires a retrial, but it appears that US domestic courts are currently of the opinion that criminal procedure is not affected[19].

8. On Tuesday, Professor Trechsel has put together a remarkable array of international jurisprudence. Nevertheless, he has drawn a rather incomplete, if not wholly misleading, picture of comparative law of criminal procedure. Instead of looking at this or that instance where Article 36 has been expressly mentioned in legal writings, rather, he should have looked, on the one hand, at the law of the procedural codes and what it says about eventual claims of a violation of Article 36, and, on the other hand, to the concrete application of Article 36 in criminal justice systems.

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[16] 36 *Australian Law Reports* 110, at 123.

[17] 77 *ILR* 541.

[18] *R.* v. *Van Axeland Wezer* (1991) 31 May, Snaresbrook Crown Court, HHJ Sich., Reported in *Legal Action* 12 Sept. 1991; *R.* v. *Bassil and Mouffareg* (1990) 28 July, Acton Crown Court, HHR Sich. Reported in *Legal Action* 23 Dec. 1990.

[19] Cf. *United States* v. *Rangel-Gonzalez*, 617 F.2d 529 (9th Cir. 1980); *United States* v. *Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979) and *United States* v. *Lombera-Camorlinga*, Counter-Memorial, Ann. 9.

9. Contrary to what the Court has been told on Tuesday, most municipal systems provide for remedies for breaches of Article 36 in their law of criminal procedure. It may be true that these remedies have not been created for the sole purpose of remedying breaches of the Consular Convention. But nobody has ever demanded such an extraordinary remedy. Rather, it is perfectly sufficient if relief can somehow be granted through the ordinary ways of appeal. Also, the point is of course not that ultimately an appeal may fail due to the circumstances in the case.

The crucial point, however, is simply that appellants must not be automatically precluded from raising this point on appeal only because the point was not argued at first instance. And this feature is indeed unique to the United States. Other countries have either directly incorporated Article 36 in their code of criminal procedure[20] — for example Spain and the Czech Republic — or recognize the provision as one that is at least in principle subject to appellate review.

10. With regard to German practice, counsel for the US sought again to convey the impression that Germany itself would not be able to deliver what it asks of the US in submission No. 4. Let me therefore use German law as an illustration of the fact that domestic law of criminal procedure does indeed allow for review of judgments which are, to cite submission No. 4, "impaired" by a violation of Article 36.

11. First, as far as the remedy of reversal of judgment is concerned, the German Constitutional Court, in its *Pakelli* decision on the European Convention on Human Rights, has left open the question whether the international legal principle of *restitutio in integrum* may lead to the reversal of German judgments. In fact Germany has introduced a provision in July 1998 providing for such a possible reversal if the European Court of Human Rights has declared that there was a violation of the European Convention on Human Rights. In the same decision, the German Constitutional Court clarified, however, that if required by international law to do so, German courts could reverse a judgment just like any other public act. Thus, the US contention that German law does not contain any possibility to reverse judgments if required by international law is, once again, simply wrong.

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[20] Cf. § 70 of the Czech Code of Criminal Procedure; Art. 520 (2) *(d)* of the Spanish Code of Criminal Procedure.

12. As to the German law of criminal procedure, an error of law which is not remedied during the trial can be put forward by appeal in three ways: *Berufung*, *Revision* and *Wiederaufnahme*. In murder cases the remedy would be *Revision* to the Federal Court of Justice. *Revision* is an appeal on questions of law only. In passing, let me mention that German courts were not yet confronted with the necessity to decide in a concrete *Revision* case about a violation of Article 36. But the doctrine is clear: To be successful, this appeal must fulfil three criteria.

(i) There must be a breach of "the law" according to Article 337 of the German Code of Criminal Procedure. In this sense law is also international customary law and international treaties as the Vienna Convention, this without any need for further implementing legislation[21].

(ii) The judgment must be based on the breach of the law. This requirement is analogous to the requirement of prejudice applied by US courts. However, there is an important difference: according to German case-law causation need not be proven! The Federal Court of Justice has constantly held that it is sufficient to show that it *cannot be excluded* that the decision of the court might have been different if the law had been applied properly. If you carefully look at our submission No. 4, you will notice that it asks only for the review of judgments "impaired by" the violation of Article 36.

(iii) The defendant must not have lost his right to an appeal.

13. German law, as interpreted by the courts, does not know provisions similar to the rule of procedural default. The German approach is different. Only specific points of appeal can be barred. First, the defendant may lose his right to put forward an error of law during appellate proceedings if he is defended by counsel and does not formally object to an order of the court during the course of the proceedings (Article 238, paragraph 2, of the German Code of Civil Procedure (StPO)). But this is not relevant to the present situation. Second, the defendant may be deemed to have waived the right to raise a particular point of appeal if the defendant's counsel does not contradict the admissibility of statements that were illegally obtained during the pre-trial phase.

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[21] Cf. Kleinknecht/Meyer-Goßner, StPO, 44th ed., § 337, MN 2; Karlsruher Kommentar zur Strafprozeßordnung, 3rd ed., § 337, MN 8.

However, a waiver is *not* possible if the judge was under an obligation to inform the defendant of his rights, including the right under Article 36.

14. Whereas counsel for the US asserted that German doctrine was silent on this point the contrary is true. All German commentaries on criminal procedure emphasize the obligation under Article 36 (VCCR)[22]. To quote from the so-called Karlsruhe Commentary invoked by Professor Trechsel: "Upon arrest of a foreigner, the consulate of his country of origin is to be notified without delay if he so requests after mandatory information of this right."[23]

15. German practice is consistent with these requirements of the Code of Criminal Procedure. No. 135 of the pertinent German Guidelines *(Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten — RIVASt)* are very clear on this matter. Detainees are, as a matter of routine, provided with a form — it is here — that informs them of their rights under Article 36. This form actually has been translated into 21 languages. To assist the judge in his duties, German authorities have devised this form that contains all relevant steps to be taken during the first hearing of the defendant. A special section is reserved for the detention of foreigners and the judge issuing a warrant of arrest must use it. The judge has to check several boxes, including whether he has informed the defendant of his rights under Article 36 and whether the detainee demands that the consulate of his home country be contacted or not. This form cannot, of course, exclude all human error. But it does demonstrate that Article 36 is relevant in criminal proceedings and that it is observed in the day-to-day work of German judges and law enforcement officers.

16. In conclusion, it is fair to say that while a violation of Article 36 of the Convention would of course not "always and automatically lead to the nullity of the decision", which Professor Trechsel foisted on us, there are definitely ways to challenge the decision of a court in a trial where the defendant had not been informed of his rights under Article 36 of the Convention. Most importantly, the defendant is not precluded from raising this point on appeal simply because

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[22] Cf. Kleinknecht/Meyer-Goßner, *Strafprozeßordnung*, 44th. ed., § 114b, MN 4 and 9; *Karlsruher Kommentar zur Strafprozeßordnung*, 3rd. ed., § 114b, MN 10; Löwe/Rosenberg, *Strafprozeßordnung*, 31st. ed., § 114).

[23] *Karlsruher Kommentar zur Strafprozeßordnung*, 3rd. ed., § 114b, MN 10.

he did not argue the point at first instance. Thus, German law is perfectly able to meet the requirements of Article 36 set out by Germany in its submission No. 4.

17. Mr. President, with regard to the question whether State practice supports the US view that violations of the Vienna Convention are irrelevant with regard to the imposition and execution of the death penalty, the answer is even more obvious. If you look at State practice worldwide, there is, to our knowledge, currently no other State in the world asserting that, even in death penalty cases, violations of the right to consular assistance are irrelevant. There is no other State applying the rule of "procedural default" or a similar rule in such a persistent and rigorous manner. There is no other State which *de facto* denies to this Court to even discuss the question of, first, whether imposition and execution of the death penalty after violation of the right to consular assistance is a proper application of the Vienna Convention and second, whether imposition of the death penalty impaired by a violation of the right to consular assistance should be open to some kind of judicial review or not.

18. What this means in the reality of today is the following: in the death penalty cases which are unfortunately so frequent in the United States, we may in all likelihood continue to see the pattern of "violate Article 36, ignore the violation in criminal proceedings, refuse to review the impact of the violation on the imposition of the death penalty, continue to apply the rule of procedural default, execute, apologize as usual".

This, indeed, is in our view a fundamental, a quintessential, challenge concerning the correct application and interpretation of the Vienna Convention around the world. As the Respondent has explicitly recognized, the right to consular assistance is, indeed, of crucial importance, not only for four million US citizens abroad but also for all foreign nationals in the United States, including German citizens.

This is why Germany seeks a clarifying judgment on our four submissions from you, the Members of the principal judicial organ of the United Nations.

19. Mr. President, I would now kindly ask you to call upon Professor Simma who will summarize our position on the remedies that Germany seeks. Thank you for your attention.

Le PRESIDENT : Je vous remercie beaucoup, et je redonne la parole au professeur Bruno Simma.

M. WESTDICKENBERG : Monsieur le président, nous avons encore besoin d'à peu près une heure pour notre plaidoirie et je vous laisse décider si, peut-être, c'est déjà maintenant le moment pour le *coffee break* ou si l'on va continuer avec le professeur Simma.

Le PRESIDENT : Je vous remercie. Je pense que nous pouvons encore entendre le professeur Simma et nous ferons la pause-café après son exposé.

Mr. SIMMA: Thank you, Mr. President, I consider this as a compliment: to be tolerable before the coffee break!

V. SAFEGUARDS AGAINST REPETITION

1. Let me turn to the Respondent's view on the topic of assurances and guarantees and, more specifically, to our submission No. 4.

2. First of all I would like to emphasize once again that in Germany's view these issues are under the jurisdiction of the Court. The Optional Protocol speaks of "disputes arising out of the interpretation or application", and what is before you in the present case is a dispute about breaches of the Vienna Convention; Germany claims entitlements arising out of these breaches and demands that the US make good the moral damage done and return to integral performance. This is a matter of State responsibility; and thus, the questions of State responsibility put forward by Germany are clearly within the ambit of the Optional Protocol.

3. The US view, according to which the responsibility aspects of our case are a matter of customary law and therefore not covered by the Protocol, would lead to absurd results. Clauses or optional protocols on dispute settlement appended to treaties could not fulfil their function because situations of breach could not be handled adequately, or not at all. What to me seems to be the case here is that what pops up is once again a milder version of the idea that the Vienna Convention régime is self-contained, that is, the only remedies available in case of breach would have to be found in the Convention itself. But of course the Vienna Convention does not contain any remedies designed to counter breaches of this kind! Let me also in this regard also remind you of

Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties, according to which a treaty has to be interpreted in the light of the relevant rules of international law, around the treaty as it were, and State responsibility is around every treaty.

4. Turning more specifically to the assurance requested in Germany's submission No. 4, counsel for the United States tried to create the impression that the International Law Commission had formulated its respective draft Article 30 with great hesitation and that it went far beyond existing law[24]. What we find in fact, however, is that the ILC proposal met with general acceptance. Not a single State opposed its inclusion in the draft on State Responsibility. There was not one word of criticism in the comments of the United States on the draft Articles adopted at first reading in 1996. The same is true for the US contribution to the Sixth Committee debate of a few days ago. Of course, I would not be surprised if we were to find something resembling Tuesday's pleadings in the United States written comments to be submitted by the beginning of next year, but that should then be seen in a certain context.

5. On the other hand, there were quite a few States reacting favourably to the ILC proposal. For instance, according to Italy, *«[q]uant aux assurances et aux garanties de non répétition du comportement illicite, bien qu'elles ne soient pas toujours nécessaires, elles se configurent comme indispensable en de nombreuses hypothèses»*[25]. As to the German comment on the 1996 draft Article[26], to which US counsel drew our attention, let us look at its text:

> "Some doubt exists, . . . as to whether the injured State has, under customary international law, the right to 'guarantees of non-repetition' . . . To impose an obligation to guarantee non-repetition in all cases would certainly go beyond what State practice deems to be appropriate."

Well, I do not have any problems with this view. Some doubts might exist about its anchoring in customary law — our debate shows this — and assurances are certainly not due in all and every case. I will come back to that in a moment.

6. As to the gist of the debate in the ILC, it was decidedly positive. Let me quote from the Commission's report on its last session:

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[24] CR 2000/29, paras. 5.18 *et seq.*

[25] Statement of 25 Oct. 2000, manuscript, p. 4.

[26] United Nations doc. A/CN.4/488, p. 103.

> "There was support for including a provision on the duty to provide assurances and guarantees of non-repetition in the draft because there were cases in which there was a real danger of a pattern of repetition and countries could not simply apologize each time."[27]

Thus, the wording of the Committee's report to the General Assembly. In this context, by the way, repeated breaches of Article 36 were expressly mentioned as examples, in the ILC debates. To continue with another quotation from the ILC report:

> "The view was . . . expressed that assurances and guarantees of non-repetition were needed in cases in which the legislation of a State and its application led to grave violations which, although not continuing, were recurrent."[28]

7. In his remarks concluding the ILC debate, Special Rapporteur James Crawford stated:

> "different views had been expressed on the retention of that subparagraph [that is, the subparagraph of the provision on cessation, which now combines cessation and our guarantees]; however, it was clear from the debate that most members of the Commission favoured its retention. . . . no government had proposed the deletion of [the respective article] . . . Replying to comments that there appeared to be no examples of guarantees of non-repetition ordered by the courts, he said it was true that there were very few such examples; on the other hand they were common in diplomatic practice . . . [T]he draft articles operated primarily in the area of relations between States, although it was the courts that might eventually have to apply them if the problem could not be resolved diplomatically. [This is precisely our situation here.] It was certainly true that assurances and guarantees of non-repetition were frequently given by Governments in response to breaches of an obligation, and not only continuing breaches."[29]

8. The report of the Drafting Committee of last August expresses itself in the same vein:

> "Several members had pointed out that assurances and guarantees of non-repetition were not appropriate in all circumstances. They should be required especially in circumstances where there was apprehension of repetition."

Such assurances "were appropriate only if the repetition of the wrongful act was likely to occur". Even though the Drafting Committee was fully aware that in the past such guarantees had involved far-reaching demands, it took the view "that guarantees could not be dropped from the articles simply because some demands had been excessive"[30].

9. To sum up the sense of the ILC debate, it saw a firm place for our assurances and guarantees of non-repetition in the codification project. There is no way of denying this,

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[27] United Nations doc. A/55/10, para. 87.

[28] *Ibid.*, para. 90.

[29] *Ibid.* para. 110.

[30] United Nations doc. A/CN.4/SR.2662, pp. 6 *et seq.*

Mr. President, because contrary to US counsel, I was there! And you can believe me that I was wide awake during the debate on draft Article 30.

10. Counsel for the United States drew attention to a remark made in the Commission according to which, "the fact that such a guarantee had been given would be a new undertaking over and above the initial undertaking that had been breached"[31]. But of course, this remark referred to the distinction underlying the Commission's work on State responsibility between so-called primary and secondary rules, i.e., it referred to the theory according to which the breach of a primary rule, for instance a rule of the Vienna Convention on Relations, gives rise to new, secondary rules, and in that sense only, to obligations over and above Article 36 of such a breach. That is all there is to that statement.

11. I would also emphasize that the assurances and guarantees of non-repetition envisaged in the draft were never understood to be as absolute as counsel for the United States tried to depict them and thereby lead them *ad absurdum*, a point to which our Agent drew attention already in his introductory statement. It is clear that nobody can be held to perform the impossible. This was so clear to the Commission that it did not consider it necessary to mention this in the draft. The same is true for Germany and for the formulation of our submission No. 4. It might be, I admit, that the term "guarantees" used by the Commission is not very fortunate, considering the misunderstandings to which it appears to have led, but the Commission uses the terms "assurances" versus "guarantees" simply to design by the second-term remedies that go beyond mere words and involve certain preventive actions: thus the report of the Drafting Committee. These actions must, according to the draft Article, be appropriate, and "appropriate" in my view means adequate and effective. In our context what this implies is that the domestic measures to be undertaken by the United States, measures taken according to their choice — I emphasize this — must be capable of resolving the absurd Catch-22 situation that we have repeatedly described.

12. Mr. President, on Monday, I explained that safeguards against repetition are appropriate in the present case under both of the two different headings corresponding to their position in the two readings of the draft Articles of the ILC: first, as a means of reparation, second, and at present,

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[31] United Nations doc. A/55/10, para. 87.

as a corollary of cessation in cases of serious danger of repetition. Mr. President, under neither of these two *sedes materiae* a showing of injury and causation beyond what Germany has already done is required. Germany has suffered moral damage through the repeated neglect of its rights under the Vienna Convention by the actions of the United States, and the causation of this damage is beyond question. If you regard safeguards against repetition as a corollary of cessation in cases where an illegal act is repeated over and over again, as is the case here, neither prejudice nor causation need to be shown.

13. Mr. Mathias quoted from the Court's Judgment in the *Haya de la Torre* case, where it was held that the Court was not in a position to state how Colombia should terminate the asylum granted to this Peruvian politician, and the Court said that it was "unable to give any practical advice as to the various courses which might be followed with a view towards terminating the asylum, since, by doing so, it would depart from its judicial function"[32]. But, Mr. President, in its submission No. 4, Germany makes precisely such a distinction between what it requests the Court to do, namely to pronounce the obligation of the United States to provide Germany with an assurance of non-repetition and to ensure in law and practice the effective exercise of the Article 36 rights, and what is to be left entirely to the United States, namely the practical side of things (to use the term of the *Haya de la Torre* Judgment), the choice of means to make these assurances stick, if I may use this American expression.

14. Mr. President, to restate a point in this connection, the Agent for the United States suggested on Tuesday morning that the Court ought to determine that the actual dispute between the Parties "has been resolved by the United States apology and appropriate assurances of non-repetition"[33]. But, Mr. President, this is simply not the case. Germany does not consider the so-called "assurances" offered by the Respondent as adequate. And therefore, it remains for the Court to decide what would constitute an appropriate remedy for the injury done to Germany and its two nationals.

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[32] CR 2000/29, para. 5.36.

[33] CR 2000/28, para. 1.17.

15. Before I leave the field of State responsibility, let me clarify that nowhere in my statement on Monday did I mock, or express contempt, as was said by US counsel, for the forms of satisfaction other than assurances and guarantees[34].

16. Mr. President, one continuous objection of the Respondent against our submission No. 4 has been that in this submission Germany is demanding something from the United States which it is unable to deliver itself. Mr. Kaul has already, and I think very convincingly, refuted this criticism but let me come to the end of my statement by stating very plainly and simply that, if submission No. 4 were put forward against Germany, Germany would be in a position to comply with it.

This completes my statement. Let me finish on a personal note. I think that both my experiences within the United Nations — my participation in the work of the International Law Commission, and my being before this Court — have a decidedly rejuvenating effect on me. I feel like a student again: in the International Law Commission, I feel like in a high-powered seminar; and before this Court, I feel like in a State exam. Thank you very much for your attention.

Le PRESIDENT : Je vous remercie beaucoup, Monsieur le professeur. Maintenant, la Cour va suspendre pour dix minutes.

L'audience est suspendue de 11 h 35 à 11 h 55.

Le PRESIDENT : Veuillez vous asseoir. Je donne maintenant la parole à M. Donovan.

Mr. DONOVAN:

VI. CAUSATION

1. Mr. President, distinguished Members of the Court, I would like to return briefly to the procedural course of the LaGrands' case in order to respond to three of Attorney-General Napolitano's points: first, that German consular officials would not have acted to assist the LaGrands; second, that the mitigation evidence of which the violation deprived the LaGrands

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[34] CR 2000/29, para. 5.22.

would have been merely cumulative of evidence already presented; and, third, that the Federal Court of Appeals satisfied itself that the evidence would have made no difference.

2. I would like to make two preliminary points first, however. First, the United States suggested on Tuesday that, the day before, Germany had condemned the US judicial system and made "newly manufactured" charges of racial discrimination. That is decidedly not the case. Germany pointed to several problems with the administration of the death penalty in the United States that have been identified by respected academics and organizations as mainstream as the American Bar Association. While people may differ about the scope and impact of those problems, and how to balance efforts to combat them with efforts toward other legitimate societal objectives, it is hard to deny that those problems exist. And because they exist, they form part of the factual circumstances in which the impact of the Vienna Convention violations here must be assessed.

3. Second, to be clear, the ground for the international responsibility in this case is provided by the breach of Article 36 of the Vienna Convention committed by the United States. But this breach of the law was not only prejudicial to the legal interests of Germany itself but also had fatal consequences for the LaGrand brothers. The argument on causation deals with this second aspect which, even if not essential in legal terms for the creation of US international responsibility, leads to an aggregation of its breach. Germany made this point on Monday when it observed that the United States had contended in its counter-statement of the facts that consular notification would have made no difference, but drew no legal consequences from that point. Except for the United States objection to one of the, as the United States would have it, five elements of Germany's first submission, that point remains unrebutted.

4. To proceed in response to the Attorney-General, I would like to address first her suggestion that Germany would not have acted even had the brothers contacted the consulate. To the contrary, we know that once the issue of citizenship was clarified, the brothers asked for help, and Germany provided it. That is the best evidence in the record before the Court about what would have happened in 1982.

5. Second, the Attorney-General argued that the evidence of which Germany claims the brothers were deprived was actually presented at the aggravation-mitigation hearing. In support of

that argument, she pointed to the testimony of an expert at the sentencing hearing and a passage in the presentence report.

6. Now it is necessary in order to assess the impact of the violation, to get into the nitty-gritty of the trial, that is unfortunately the case and I therefore invite the Court to review the materials in the record, but I will review them briefly here. The first expert to testify at the hearing was called on behalf of Walter LaGrand. On cross-examination, which takes up less than three pages of the transcript of that hearing, the prosecutor established, first, that the expert had met with Walter LaGrand for no more than an hour, approximately a year before the hearing; second, that the purpose of even that meeting was to establish Walter LaGrand's "mental state at or around the time of the incident", not to discuss mitigating factors that might have been relevant to sentencing; and third, that the only other preparation that the expert had done was to review presentence reports. No wonder the prosecutor saw so little need to cross-examine.

7. The second expert was called on behalf of Karl. He is the fellow that the Attorney-General quoted. He testified that he had spent an hour-and-a-half with Karl, and that the principal focus of his testimony was his opinion, based on the tape of Karl's confession, that Karl was telling the truth when he expressed remorse immediately after the arrest. In so far as he addressed social history, the superficial nature of his analysis, which the Attorney-General quoted, speaks for itself. The prosecutor obviously thought the same, because he spent even less time with Karl's expert than he had with Walter's — six questions, to be precise, taking up less than a page of transcript.

8. The only other witness to testify was Patricia LaGrand, Karl and Walter LaGrands' sister. While she surely testified to a difficult childhood, she just as surely could not make up for the absence of detailed information about the LaGrands' early childhood or, needless to say, the inadequacies of the experts' testimony.

9. Finally, the presentence reports, to be sure, include a brief, general statement about the unfortunate circumstances of the LaGrands' upbringing. But a few references in a presentence report cannot substitute for a case in mitigation.

10. We know that the information eventually secured from Germany provided concrete and extensive evidence of serious abuse and neglect during infancy and early childhood. To consider

the effect that evidence might have had, I again invite the Court to review the declaration of the mitigation expert included in the Annexes. She describes in detail the standard of care in capital cases, the minimal content of a social history as the start of a case in mitigation, and the use to which the history must be put. Specifically she explains:

> "Only with properly and independently gathered data can mental health professionals assess:
>
> (1) the presence and effect of medical, psychiatric and developmental disorders; and
>
> (2) the role of critical social, emotional and other factors, including pivotal life experiences, and their effect o[n] the individual's mental state and behaviour at critical points relevant to the charges and subsequent legal proceedings."

In other words, a minimally competent mitigation case must not only identify the relevant social, psychological, and developmental factors but it has to demonstrate a cause of connection between those factors and the charges at issue.

11. Judged by that standard, the aggravation-mitigation case put on at the sentencing hearing here can only be described as woeful. When one compares the sentencing hearing transcript to the expert's affidavit, one can appreciate the poor quality. But that conclusion draws additional support from other evidence before this Court: first, by the affidavit from Karl's lawyer admitting his own deficiencies, to which Germany has previously made reference; second, by the affidavit from an Arizona criminal lawyer expressing the view that the performance of Walter's lawyer "fell below the minimum standard of a defence counsel at a capital sentencing"; again specifically referring to the sentencing hearing and third, by the affidavit from Walter's *habeas* counsel, an experienced capital defender, who expressed the view that "[h]ad their trial counsel presented a complete case for mitigation, the LaGrands likely would not have been sentenced to death"[35].

12. Finally, I would like to address the Attorney-General's suggestion that in its 1998 opinion the Federal Court of Appeals somehow "peeked behind the veil" to assure itself that, even though the LaGrands had not been able to present the missing mitigation evidence at their sentencing, no miscarriage of justice had been done[36]. Now it's unclear from the transcript that I've reviewed exactly what point the Attorney-General wished to make, so I want to make sure that there is no

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[35] Anns. MG 46, at pp. 1013-17; MG 50, at p. 1113; MG 52, at p. 1216.

[36] Ann. MG 10, at p. 483 (citing *Sawyer* v. *Whitley*, 505 U.S. 333 (1992)).

confusion. As the Ninth Circuit's opinion reflects, the Court understood itself to be expressly barred by prevailing Supreme Court authority from considering what impact the mitigation evidence might have had. Instead, it restricted itself solely to the presence of aggravating circumstances that would make the LaGrands "death eligible". Now of course, the LaGrands did not claim that the missing mitigation evidence was relevant to the aggravating circumstances which had been found which made them "death eligible", and therefore the Court held that the mitigation evidence was irrelevant to its enquiry as restricted by prevailing authority. Thus, the LaGrands were in fact deprived by this evidence at trial — what the US Supreme Court has called the "main event"[37] — and neither the Ninth Circuit nor any other court in the United States ever considered the effect that the missing mitigation evidence would have had on the LaGrands' sentencing.

13. And there lies the basic factual question and there lies the place at which Germany runs into the evidentiary obstacles that I identified on Monday. As one of the pillars of the individualized sentencing required by the US Constitution, a defendant may introduce at the sentencing hearing any mitigation evidence he or she may think relevant, and the sentencing judge or jury has complete discretion to weigh that mitigation evidence against the aggravating factors that make the defendant "death eligible".

14. Needless to say, that is a supremely subjective judgment, and at this point in time it would be virtually impossible to reconstruct the mental processes by which it might have been made. In these circumstances — the fact judgment arises — how does a judicial system deal with that fact? Well, one comparison that might be made is by the most widely used standard of review in US proceedings which is that if a trial error is made, if a right is violated, the defendant is entitled to relief unless the court can conclude that the violation was a harmless error. The United States objected on Tuesday to Germany's suggestion that the Court should presume causation, but it did not — because it could not — contest Germany's argument that this Court has the authority to assess the evidence in the light of the specific and concrete facts of the case, that the Court has the authority to determine how it will determine facts, and that the Court has the authority to make appropriate rulings in light of the evidentiary prejudice caused Germany by

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[37] *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977).

United States actions. That authority should include the authority to deem contested facts established, or to shift the burden of proof on the basis of the showing that Germany has already made, if those rulings were necessary. That authority is the necessary prerogative of any fact-finder. As I said on Monday, however, no such evidentiary rulings are necessary.

15. To the extent that the precise causation issue here is amenable to proof, Germany has demonstrated that the Vienna Convention violations led to the LaGrands' sentences of death. At the very minimum, Germany has shown that the acknowledged violations deprived the LaGrands of mitigating evidence that would have been highly relevant to their sentencing and that could have caused the judge to impose a life sentence rather than death. The Trostler case from the Arizona Supreme Court, to which I referred on Monday, demonstrates that exactly the kind of mitigation evidence that was lost here can have that impact. No rule of evidence or principle of international law requires Germany to demonstrate anything more.

At this point, Mr. President, I would request that you call upon Professor Dupuy.

The PRESIDENT: Thank you, Mr. Donovan. Je passe la parole maintenant au professeur Pierre-Marie Dupuy.

M. DUPUY :

VII. LA MÉCONNAISSANCE PAR LES ETATS-UNIS DE L'ORDONNANCE DU 3 MARS 1999

1. Monsieur le président, il m'appartient de répondre aux arguments développés devant vous par les Etats-Unis à propos des mesures conservatoires et de la troisième conclusion de l'Allemagne. Je le ferai assez brièvement car les Etats-Unis ont, pour l'essentiel, repris, lors de leur plaidoirie de mardi dernier, les arguments qu'ils avaient déjà développés dans leur contre-mémoire. Il l'on fait, toutefois, non sans opérer certaines concessions dont on appréciera la portée (I). Se concentrant sur l'ordonnance du 3 mars 1999 pour mieux éviter un débat de fond sur la nature juridique des mesures conservatoires, à défaut de plaider le droit, ils ont voulu se concentrer sur les faits. Ils ont ainsi entendu démontrer que les Etats-Unis n'auraient pas pu agir autrement que ce qu'ils ont fait après avoir reçu l'ordonnance de la Cour (II); et ceci, parce que la requête de l'Allemagne en indication de mesures conservatoires aurait été trop tardive (III). Enfin,

les Etats-Unis se sont efforcés de dissocier aussi complètement que possible leur méconnaissance de l'ordonnance de la Cour d'avec le fond de la demande allemande elle-même (IV). Je reprendrai brièvement ces points.

I

2. *S'agissant du droit*, je ne vais pas réitérer le cœur de mon propos de lundi dernier sur la nature juridique des mesures comme sur celles des obligations qu'elles créent, mesures comme décisions de procédure, distinctes des jugements, engendrant des obligations de diligence à la charge de leurs destinataires, obligations dont le contenu et la plus ou moins grande rigidité dépendront, en chaque cas, des circonstances de l'espèce.

Constatons cependant deux choses dans la position avancée par les Etats-Unis mardi : d'abord, un repli stratégique, ensuite, une contradiction.

Le repli vient du fait que, selon eux, il ne servirait à rien pour les besoins de l'espèce que la Cour se prononce sur le droit des mesures conservatoires, puisqu'en l'occurrence, celles indiquées le 3 mars 1999 étaient manifestement facultatives.

Les Etats-Unis usent alors à nouveau de leur arme décidément favorite, à savoir l'argument linguistique du *"Should/Ought"*, comme on pourrait l'appeler.

Laissez donc, Madame et Messieurs les juges, planer l'ambiguïté sur ce que vous faites lorsque vous ordonner des mesures conservatoires. Jouez de la demi-teinte ou du clair-obscur et vous satisferez, au moins, les Etats-Unis.

3. Pourtant, et c'est ce qui gêne les Etats-Unis, vous avez déjà très clairement manifesté, en bien des occasions que j'ai d'ailleurs rappelées, votre désir de dissiper les équivoques sur la nature décisoire des ordonnances et, partant, sur leurs effets juridiques. Vous l'avez, le plus récemment fait dans votre ordonnance du 1^er^ juillet 2000 en l'affaire *Congo c. Ouganda*. Et, vous l'avez fait dans les termes limpides que j'ai moi-même rappelés lundi dernier. D'où la contradiction américaine que j'annonçais.

Comment peut-on, en effet, conjointement affirmer, comme l'ont fait pourtant fait les Etats-Unis avant hier, d'une part : *"indications of provisional measures by the Court do not give* *rise to binding legal obligations"*[38] et, d'autre part, consentir que lorsque la Cour emploie un langage différent, *a "language of understood mandatory character"*[39], comme elle le fit récemment dans l'affaire précitée, c'est qu'elle entend prendre une ordonnance ayant valeur obligatoire.

Allons, Messieurs ! Il faut savoir ! La Cour peut-elle ou ne peut-elle pas prendre des mesures conservatoires à portée obligatoire ? C'est l'un ou c'est l'autre.

Eh bien, nous répond-on de l'autre côté de la barre, tout est affaire de langage ! Selon les cas, disent les Etats—Unis, suivant que la Cour en restera au *"Should"* et au *"Ought"*, ou bien qu'elle se résoudra à employer la langue de l'autorité, c'est-à-dire … le français, les Parties sauront ce qu'elle a voulu dire !

Mais, en définitive, concluent les Etats-Unis, soudain conscients que concession rime ici avec contradiction, les mesures conservatoires *"stand as a clear statement of the Court's expectations and desires"*. Attentes et désirs ! Cela sonne comme le titre d'un bien mauvais roman !

4. Quant à nous, Monsieur le président, Madame et Messieurs, l'Allemagne vous indique par ma voix, que, pour elle, «vos désirs sont des ordres» ! Et qu'il n'y a pas trente-six façons de comprendre le sens, la logique et l'utilité des mesures conservatoires que vous indiquez. Qu'une juridiction ne peut pas, à la fois se réunir, délibérer, ordonner, même s'il est dit que, par là, elle «indique», sans attendre, en droit, que les parties défèrent à son ordonnance. Qu'il ne saurait y avoir de demi-mesure ni d'hésitation. Et qu'il n'est qu'à se pencher sur la logique judiciaire, inhérente au cours du procès international, comme le soulignait sir Gerald Fitzmaurice, étayée par votre jurisprudence pour conclure que de telles ordonnances sont, toujours, et pas une fois sur deux, ou trois, ou six, de véritables décisions.

Décisions de procédure, elles sont toujours obligatoires, quoique provisoires et ancillaires par rapport au jugement; mais la rigidité des obligations qu'elles engendrent dépendra notamment de l'intensité de l'urgence comme de la balance des intérêts en présence. En l'occurrence, c'était littéralement une question de vie ou de mort, et il n'y avait d'autre issue possible que d'obtempérer, c'est-à-dire, très simplement, de surseoir à exécuter.

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[38] Intervention de M. Matheson, CR 2000/29, par. 7.1 p. 44.

[39] *Ibid.*, par. 7.6, p. 3.

II

5. C'est là, précisément — et c'est mon second point — que l'on en vient aux faits. Les faits, nous disent les Etats-Unis, ne nous ont pas permis de faire autre chose que ce que nous avons fait : nous avons réveillé le conseiller juridique du département d'Etat (ce qui, il faut le croire, n'est pas rien) et nous avons transmis l'ordonnance à qui de droit, non sans que, pour ce qui concerne la Cour suprême, le *Solicitor General* ait rappelé que cette ordonnance n'avait aucun effet. Et s'il en est ainsi, c'est parce que l'Allemagne, nous disent les Etats-Unis, et aussi la Cour, ayant statué sans même nous entendre, nous avaient mis dans une telle situation.

Alors, puisque les Etats-Unis nous invitent à en venir aux faits, nous allons à présent les examiner. Et nous le ferons pour répondre à deux séries de questions précises. La première est la suivante : est-ce que les Etats-Unis pouvaient faire, oui ou non, autre chose que ce qu'ils ont fait après avoir reçu votre ordonnance, et ceci, à trois niveaux, celui de l'Etat d'Arizona, celui de l'organe judiciaire fédéral, c'est-à-dire la Cour suprême, et celui de l'exécutif fédéral ?

Dans ces trois cas, la réponse est positive : au niveau de l'Etat fédéré, c'est-à-dire de l'Arizona, comme l'a d'ailleurs admis Mme Napolitano, le gouverneur ne peut agir, à ce stade, en suspension d'une exécution que s'il est sollicité de le faire par le *Clemency Board*. Mais, précisément, dans ce cas, le défendeur s'est, si j'ose dire, empressé, de ne pas vous rappeler que telle était la situation. Le gouverneur était ainsi sollicité par le *Clemency Board* !

Au niveau fédéral, pour ce qui concerne la Cour suprême, elle aurait encore très bien pu agir, dans le cadre des procédures d'urgence pendantes devant elle, pour ordonner la suspension d'exécution. Et la preuve qu'elle avait le temps matériel de le faire a été apportée, en l'occurrence, par elle-même. Elle a en effet pris un jugement dans le laps de temps précédant l'exécution de Walter LaGrand. Simplement, elle l'a pris dans l'autre sens, celui de l'autorisation de faire pénétrer Walter LaGrand dans la chambre à gaz.

Quant à l'exécutif fédéral, il aurait pu, tenant compte notamment de la levée de bouclier qu'avait soulevée l'affaire *Breard* de la part des différents secteurs de l'opinion, y compris les plus avertis, il aurait pu soit demander à la Cour suprême d'ordonner la suspension, soit agir lui-même auprès de l'autorité locale, mais il s'est contenté de la répétition, mot pour mot, par la voix du *Solicitor General*, de l'idée selon laquelle votre ordonnance n'avait aucun effet obligatoire.

Deuxième série de questions pratiques : les Etats-Unis prétendent qu'ils auraient pu agir autrement s'ils avaient disposé de plus de temps. Ils oublient seulement un détail, c'est que, un an auparavant, placés dans les mêmes conditions que dans l'affaire *LaGrand*, mais avec, à l'époque, beaucoup plus de temps, ils ont pourtant agi exactement de la même manière à l'égard d'Angel Francisco Breard qu'ils le feront ensuite à l'égard de Walter LaGrand.

Allons, décidément, la chanson a raison, qui nous dit «le temps ne fait rien à l'affaire»; d'autant qu'en l'occurrence, le raisonnement du défendeur est une fois de plus circulaire, puisque, précisément, ce que lui demandait la Cour, c'était de lui en accorder, du temps. Et ce temps, les Etats-Unis pouvaient, juridiquement et matériellement, le lui accorder.

6. Cependant, Monsieur le président, Madame et Messieurs les juges, vous n'êtes nullement obligés de me croire. N'étant moi-même qu'un modeste *"academician"* dont Mme Catherine Brown vous a tant manifesté le peu de crédit qu'ils méritaient, je ne vais pas procéder exactement à un appel à témoin, mais tout simplement vous prier, Monsieur le président, de bien vouloir redonner la parole à un autre conseil de l'Allemagne sur les deux séries de questions que je viens d'évoquer, car lui est bel et bien un praticien, qui plus est, un praticien américain : c'est M. Donovan

Après quoi, si vous le permettez, je reprendrai brièvement la parole pour conclure cette plaidoirie relative à l'effet des mesures conservatoires et leur violation par le défendeur. Je vous demande par conséquent, Monsieur le président, de bien vouloir redonner, pour une brève intervention, la parole à M. Donovan.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. And now I give the floor to Mr. Donovan.

Mr. DONOVAN:

III

7. Mr. President, distinguished Members of the Court, as Professor Dupuy has suggested, I will like to address the United States' argument that even though Arizona chose to proceed with the execution of Walter LaGrand in the face of this Court's Order, the United States complied with that

Order because it took all steps "at its disposal" to ensure that he was not executed. I respectfully refer the Court to the citations in the written version of my submissions, but I will suggest that the United States is wrong both as a matter of international law, which matters here, and US domestic law, which does not.

8. First, and most clearly, the Attorney-General explained to us on Tuesday, that Arizona law permits the Governor to grant clemency or commutation or a reprieve if the Clemency Board so recommends[40]. As the Attorney-General also explained here, precisely because of Germany's intervention to this Court, the Clemency Board did recommended a reprieve.

9. The United States has assured the Court that it followed the Court's specific direction that it convey this Court's Order of Provisional Measures to the Governor, and there is no suggestion that Arizona officials did not know of the Court's Order once it was delivered. As the Attorney-General has explained, at that time, the Governor was fully empowered even under Arizona law to grant a reprieve, but she chose not to. Indeed, as the Attorney-General has already explained, the Governor chose not to even before this Court had ruled. She announced the day before, that she would not grant commutation or a reprieve, would not grant clemency, and she made that announcement, again as the Attorney-General has explained to this Court, in part in reliance on the advice of the United States, that any Order this Court might issue would not be binding.

10. As the United States acknowledges in paragraphs 3 and 6 of its Counter-Memorial, it is internationally responsible "for the actions of Arizona". Thus, the Governor's refusal to suspend the execution is alone dispositive of the United States argument that it took all measures at its disposal. The Governor could have stopped the execution, she chose not to.

11. In any event, the United States federal authorities had ample additional means at their disposal to comply with the Order. The federal judicial authority of the United States, of course, also engages its international responsibility. On the day of this Court's ruling, both Germany and Walter LaGrand filed applications in the United States Supreme Court seeking, respectively, an injunction against and a stay of the execution. Walter's filing raised the Vienna Convention claim,

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[40] Ariz. Const., Art. 5, Sec. 5; Ariz. Rev. Stat., Sec. 31-402.

Germany's filing relied directly on the ICJ Order. Both applications were denied[41]. In rejecting Germany's application, the court expressed some doubts about its jurisdiction over the filing. As the Attorney-General mentioned, the filing was made under a very infrequently used provision of the United States Constitution authorizing original bills of complaint to that court. But even if there were question about the court's jurisdiction over Germany's application there can be no question about its jurisdiction to provide relief on Walter's application, that is on a *habeas* petition. pending in that court[42]. While the Supreme Court's opinion in Germany's application cites the tardiness of the plea as one of the bases for declining to grant relief, there can be no question from that decision that the Supreme Court indeed had time to decide; and that is also clear from the dissenting opinion in the parallel Order denying relief on Walter LaGrand's application. So the Supreme Court, also the federal judicial authority, had time to make a decision whether or not it would comply with this Court's Order.

12. Indeed, there was yet another proceeding involving Walter LaGrand in which the Supreme Court took action on the day of the execution. On that day, the Ninth Circuit, the intermediate federal court of appeals covering Arizona, entered an injunction against the execution on the ground that execution by lethal gas was cruel and unusual punishment, and therefore unconstitutional. The state immediately filed a petition for a writ of *certiorari* to the United States Supreme Court, asking that that injunction be vacated. The Supreme Court, on the day of the execution, granted the writ, summarily reversed the Ninth Circuit's judgment, and vacated the injunction. That permitted the execution to go forward by virtue of the third order issued by the United States Supreme Court on 3 March 1999 in cases involving Walter LaGrand[43].

13. There were similar proceedings, as it happens, on the day of Karl LaGrand's execution. On that day, the Ninth Circuit also entered an injunction against the execution on the ground that lethal gas was unconstitutional and enjoined the execution. Arizona on that day filed an application

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[41] Ann. 30 (*Federal Republic of Germany* v. *United States*, 526 US 111 (1999)), 32 (*LaGrand* v. *Arizona*, 526 US 1001 (1999)).

[42] 28 U.S.C. § 2254 (authorizing federal court to entertain habeas petition from person in custody pursuant to state judgment "on the ground that he is in custody in violation of the Constitution or law or treaties of the United States"); see also *Missouri* v. *Jenkins*, 495 US 33, 57 (1990) (federal court may enjoin municipality to levy taxes to comply with desegregation order, even when levy would contravene state law); *Asakura* v. *Seattle*, 265 US 332 (1924) (enjoining enforcement of municipal ordinance in violation of treaty); *French* v. *Hay*, 89 US (22 Wall.) 250 (1874) (federal court may enjoin enforcement of state judgment entered in violation of federal law).

[43] Ann. 31 (*Stewart* v. *LaGrand*, 526 US 115 (1999)).

to lift the injunction, which the Supreme Court granted. Karl LaGrand's lawyers then filed a motion for clarification of the order, and the Supreme Court denied that application. Only then did Arizona officials go forward with the execution[44].

14. These kinds of pre-execution applications are a regular feature of US death penalty litigation, and US federal courts are well-accustomed to them. Whether one agrees or disagrees with the federal courts' death penalty rulings in the United States, there can be no question that the Supreme Court takes very seriously its obligations to decide cases, in this area as in others. The justices are always available for emergency applications. In the specific case of death penalty litigation, when an execution is scheduled, the Clerk of the United States Supreme Court stays in close contact both with the clerk of the lower court from which a case might be coming and with state officials responsible for the execution. As will not come as a surprise, state officials generally wait for the ruling of the Supreme Court before proceeding with an execution as to which there might be a request for relief pending. I would respectfully suggest to this Court that it would demean both the dignity and the diligence of the United States Supreme Court to suggest that, in a case where human life was at stake, that court would not do whatever was necessary to properly decide the case before it.

15. The executive branch also had means "at its disposal" to comply with the Court's Order. The President has very broad authority to facilitate the resolution of international disputes[45], and he could have exercised that authority, according to at least one scholar, by use of an executive order[46]. Now, the United States will no doubt suggest that several hours was not sufficient in order to actually issue an executive order: but one suspects that if the federal executive had firmly indicated its intention to issue such an order to responsible officials of the State of Arizona, they might have suspended the execution to allow the federal executive to take the appropriate steps.

16. In any event, it is also clear that the federal executive can sue in federal court against the state or state officials in order to enforce a federal obligation. The United States itself confirmed

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[44] Ann. 31, at p. 674; see *LaGrand* v. *Stewart*, 173 F.3d 1144 (24 Feb. 1999), stay vacated by *Stewart* v. *LaGrand*, 525 US 1173 (24 Feb. 1999).

[45] *Dames & Moore* v. *Regan*, 453 US 654 (1981).

[46] See Carlos Manuel Vásquez, "Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures", 92 *AJIL* 683 (1998).

that in the *Breard* case when it advised the Supreme Court in its filings there that the United States had authority "to sue in order to enforce compliance with the Vienna Convention"[47]. In this case, for example, the United States attorney in the district of Arizona could have gone to a federal judge in the district of Arizona on an emergency application and asked that judge to suspend the execution in order to comply with the International Court of Justice's Order. Federal courts generally give deference to the executive's interpretation of international obligations and, particularly given the emergency circumstances that would have existed at that point, it is likely that a federal court would have adhered to the United States request.

17. Having said all this, it may be worthwhile to pause to recall that none of it matters. It is a fundamental principle of international law that, as a former President of this Court has said, a State

> "cannot evade [its international] responsibility by alleging that its constitutional powers of control over [its political subdivisions] are insufficient for it to enforce compliance with its international obligations"[48].

Surely when the Court called upon the United States to employ all means at its disposal to ensure that Walter LaGrand was not executed, it did not intend to incorporate into that Order any particular limitations on US federal authority within the US constitutional system. Not only would that kind of interpretation fly in the face of a most basic principle of international law, but it would also require this Court to determine complex questions of US constitutional law simply to determine whether its Order had been complied with. Surely, the Court could not have so intended.

18. Finally, the United States suggests that the timing of the Court's Order did not give it sufficient time to deliberate. Of course, a court order is generally not understood as an invitation to a party to deliberate; it is generally understood that the order itself represents the judgment as to the necessity of action given the prevailing circumstances. But in any event, there is no reason to believe that further deliberation would have led to a different result. The United States has itself drawn a comparison to the Paraguay case, in which, in the United States view, Paraguay acted with sufficient despatch to allow all actors to make appropriate decisions. But we know what happened in the Paraguay case: the United States federal executive advised both the Governor of Virginia

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[47] "Brief of the United States as *Amicus Curiae*", p. 15, No. 3, *Breard* v. *Greene*, 523 US 371 (1998).

[48] Jiménez de Aréchaga, "International Responsibility", in *Manual of Public International Law* (Max Sørenson, Ed., 1968), pp. 531, 557.

and the United States Supreme Court that indications of provisional measures by this Court were not binding. There, as here, the United States Supreme Court and the Governor of Arizona adhered to that recommendation and declined to give effect to that Order.

19. Mr. President, distinguished Members of the Court, the United States is a nation of laws, committed to the rule of law. The United States did not fail to comply with this Court's indication of provisional measures because it did not have time to comply. It did not comply with this Court's indication of provisional measures because, as it has stated here in these proceedings, it did not regard that indication as law. This case provides the Court an opportunity to establish that it was.

20. I would request the Court to call again upon Professor Dupuy.

The PRESIDENT: Thank you very much. Je donne maintenant la parole au professeur Pierre-Marie Dupuy.

M. DUPUY : Je vous remercie, Monsieur le président. Je serai très bref. J'ai simplement un dernier point encore à relever qui concerne le désir des Etats-Unis d'éliminer toute relation entre la violation des mesures conservatoires et le fond de l'affaire.

IV

21. Le conseil des Etats-Unis a clairement indiqué devant vous mardi dernier que, selon eux, *"The Court can dispose of the merits of this case without any need to resolve this issue"*.[49] *"This issue"*, c'est la question de la responsabilité américaine pour non-application des mesures conservatoires.

L'invitation faite à la Cour consiste à lui demander de ne pas se prononcer sur la conclusion n° 3 de l'Allemagne, et, ceci, parce qu'en définitive, elle n'aurait rien à voir avec le fond. Le fond, c'est, pour les Etats-Unis, la requête en réparation par satisfaction demandée par l'Allemagne. La question des mesures conservatoires, c'est autre chose, un incident de procédure, un accident de parcours, une anicroche, pour ne pas dire une peccadille, pas davantage. Alors, ici, je serai bref, d'autant plus qu'il serait malséant de se répéter.

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[49] *Ibid.*, p. 52.

Je me contenterai de rappeler que les Etats-Unis ont méconnu une obligation juridique, posée par l'acte juridique qu'était votre ordonnance. Or, en l'occurrence, compte tenu des données de l'espèce, c'est-à-dire de l'extrême urgence, de l'objet vital de l'enjeu, et de la balance des intérêts en présence, les Etats-Unis étaient tenus de suspendre l'exécution. Ils ne l'ont pas fait. Ils engagent leur responsabilité. Et ils l'engagent sur une base nouvelle par rapport à l'accusation principale qui leur est adressée par l'Allemagne, laquelle réside, comme vous le savez, dans la violation de l'article 36 de la convention de Vienne.

22. Mais, nouvelle, cette responsabilité pour violation de l'ordonnance du 3 mars 1999, même si elle peut être examinée comme telle, reste cependant corrélée, dans les faits, avec la responsabilité principale des Etats-Unis. Et elle a aussi des conséquences juridiques au fond. Elle lui reste liée parce qu'elle rend impossible la seule réparation satisfaisante, qui n'était pas la satisfaction, mais qui aurait pu être la *restitutio in integrum* si Walter LaGrand avait été laissé en vie le temps nécessaire à la formation de votre propre jugement. Lequel n'aurait pas réformé les décisions judiciaires internes américaines; ceci, vous ne le pouvez ni ne le devez; mais votre jugement qui aurait constaté, dans l'ordre juridique international, l'existence d'un corps d'obligations, en l'occurrence méconnues par les Etats-Unis, ce qui les obligeait à «répondre», en droit international, de leur fait illicite international, c'est-à-dire à être internationalement responsables. Que cette responsabilité dans l'ordre international se traduise, ensuite, par des conséquences dans l'ordre interne, il n'y a là rien que de très usuel, et l'on n'a même pas attendu l'avènement des droits de l'homme, qui ne datent pourtant plus d'aujourd'hui, pour connaître de telles situations.

23. Les Etats-Unis sont responsables, en soi, parce qu'ils n'ont pas déféré à l'obligation provisoire que vous leur faisiez dans l'urgence. Mais ils sont, du même coup, également responsables, au fond, d'une aggravation des conséquences du préjudice qu'ils avaient infligé à l'Allemagne du fait de la violation de l'article 36 de la convention de Vienne de 1963. Or, il paraît d'un bon usage du sens commun que de dire qu'à dommage aggravé correspond une responsabilité elle-même aggravée.

24. L'Allemagne, en fait de réparation, vous demande une satisfaction. Mais elle le fait tout en sachant qu'il n'y a rien de plus insatisfaisant que la satisfaction ! Du moins lorsqu'il s'agit de payer par là le *pretium doloris*, que l'on pourrait traduire, en l'occurrence, par le prix du sang !

C'est pour cela, pour cela aussi, que la simple satisfaction de droit commun, si j'ose dire, celle qui réside dans des excuses, ne suffit pas, même si les excuses américaines s'étendaient, ce qu'elles ne font de toute façon pas, à l'ensemble des violations de l'article 36.

L'aggravation du préjudice causé par la méconnaissance de l'ordonnance, en rendant le dommage allemand irréparable, c'est-à-dire imparfaitement réparable, suppose une satisfaction renforcée.

Si j'avais le cœur à en rire, ce qui n'est pas le cas, je dirais, que la satisfaction renforcée, compte tenu du caractère tragiquement répétitif des agissements américains à propos des condamnés à mort sans bénéfice de l'assistance consulaire, c'est celle que l'on impose à des enfants lorsqu'on leur demande de reconnaître leur faute, certes, mais aussi «de s'engager à ne pas recommencer». Je crains cependant, Monsieur le président, Madame et Messieurs les juges, que sans votre décision et, cette fois, votre décision de jugement, les Etats-Unis n'aient pas spontanément la sagesse que l'on prête habituellement aux enfants…

J'en ai ici terminé, du moins avec les points essentiels qui me paraissaient devoir être relevés dans la plaidoirie des Etats-Unis sur les mesures conservatoires et je vous demande, Monsieur le président, de bien vouloir donner à présent la parole à M. Westdickenberg, agent de la République fédérale d'Allemagne, pour qu'il conclue ce second et dernier tour de nos plaidoiries.

Le PRESIDENT : Je vous remercie Monsieur le professeur. Je donne maintenant la parole à M. Westdickenberg, agent de la République fédérale d'Allemagne.

Mr. WESTDICKENBERG :

VIII

Mr. President, distinguished Members of the Court, after the presentation of Professor Dupuy we come to the end of the German pleading in this case.

Before reading out Germany's submissions let me add two remarks:

— First, my collegues and myself, representing together the Federal Republic of Germany in this case, are oblivious neither of the fact that at the root of this case there were two men who were executed for crimes they committed, nor of the suffering of the victims and those left behind.

— Second, the oral proceedings of this Court so far have confirmed the hope I expressed in my introductory statement: Germany and the United States can litigate in a manner reflecting the good and close relations as friends and allied partners.

SUBMISSIONS OF GERMANY

The Federal Republic of Germany respectfully requests the Court to adjudge and declare

(1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, subparagraph 1 *(b)*, of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36, paragraph 1, of the said Convention;

(2) that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36, paragraph 2, of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended;

(3) that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligations to comply with the Order on Provisional Measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject-matter of a dispute while judicial proceedings are pending;

and, pursuant to the foregoing international legal obligations,

(4) that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36.

Thank you, Mr. President and distinguished Members of the Court, this ends the pleading for the German side.

Le PRESIDENT : Je vous remercie, Monsieur Westdickenberg. La Cour prend acte des conclusions finales dont vous avez donné lecture au nom de la République fédérale d'Allemagne. Ceci met un terme à notre séance d'aujourd'hui. La Cour se réunira à nouveau demain à 14 heures pour entendre le second tour de plaidoiries des Etats-Unis d'Amérique. La séance est levée.

L'audience est levée à 12 h 45.

CR 2000/31

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2000

Public sitting

held on Friday 17 November 2000, at 2 p.m., at the Peace Palace,

President Guillaume presiding

in the LaGrand Case
(Germany v. United States of America)

VERBATIM RECORD

ANNÉE 2000

Audience publique

tenue le vendredi 17 novembre 2000, à 14 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président

en l'affaire LaGrand
(Allemagne c. Etats Unis d'Amérique)

COMPTE RENDU

Present: President Guillaume
Vice-President Shi
Judges Oda
Bedjaoui
Ranjeva
Herczegh
Fleischhauer
Koroma
Vereshchetin
Higgins
Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal

Registrar Couvreur

The Government of the Federal Republic of Germany is represented by:

Mr. Gerhard Westdickenberg, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Eberhard U. B. von Puttkamer, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Bruno Simma, Professor of Public International Law at the University of Munich,

as Co-Agent and Counsel;

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and at the European University Institute in Florence,

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Hans-Peter Kaul, Head of the Public International Law Division, Federal Foreign Office,

Dr. Daniel Khan, University of Munich,

Dr. Andreas Paulus, University of Munich,

as Counsel;

Dr. Eberhard Desch, Federal Ministry of Justice,

Dr. S. Johannes Trommer, Embassy of the Federal Republic of Germany in the Netherlands,

Mr. Andreas Götze, Federal Foreign Office,

as Adviser;

Ms Fiona Sneddon,

as Assistant.

The Government of the United States of America is represented by:

Mr. James H. Thessin, Acting Legal Adviser, United States Department of State,

as Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

as Deputy Agents;

The Honourable Janet Napolitano, Attorney General, State of Arizona,

Professor Michael J. Matheson, Professor of International Law, School of Advanced International Studies, Johns Hopkins University; former Acting Legal Adviser, United States Department of State,

Professor Theodor Meron, Counsellor on International Law, United States Department of State; Charles L. Denison Professor of International Law, New York University; Associate Member of the Institute of International Law,

Professor Stefan Trechsel, Professor of Criminal Law and Procedure, University of Zurich Faculty of Law,

as Counsel and Advocates;

Professor Shabtai Rosenne, Member of the Israel Bar; Honorary Member of the American Society of International Law; Member of the Institute of International Law,

Ms Norma B. Martens, Assistant Attorney General, State of Arizona,

Mr. Paul J. McMurdie, Assistant Attorney General, State of Arizona,

Mr. Robert J. Erickson, Principal Deputy Chief, Appellate Section, Criminal Division, United States Department of Justice,

Mr. Allen S. Weiner, Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

Ms Jessica R. Holmes, Attaché, Office of the Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

as Counsel.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte. Nous sommes réunis aujourd'hui pour entendre le deuxième tour de plaidoiries des Etats-Unis d'Amérique, et je vais donner immédiatement la parole à M. Thessin, agent pour le Gouvernement des Etats-Unis d'Amérique.

Mr. THESSIN: Thank you, Mr. President.

1.1. Mr. President, Members of the Court, learned counsel, ladies and gentlemen.

1.2. My friend, Mr. Westdickenberg, productively recalled for us that this is the World Court, a court with the function to resolve international legal disputes between States. Yet after numerous German efforts to argue the facts and its frequent interventions to debate public policy, we often were left believing that we were before the United States Supreme Court or listening to debates before the Arizona state legislature or the United States Congress.

1.3. In our previous pleadings, the United States set forth in detail the fundamental facts and legal principles of this case. The points we make today will re-emphasize these principles and supplement these pleadings, on which we continue to stand.

1.4. This case should, indeed it must, be decided upon the principles of international law. That is the Court's mandate; that is its proper charge. Permit me again to summarize the legal principles that our previous pleadings have supported fully.

1.5. The Court's jurisdiction is founded on the Optional Protocol concerning the Compulsory Settlement of Disputes of the Vienna Convention on Consular Relations. The Consular Convention required the competent authorities to inform Walter and Karl LaGrand without delay that each had the right to have those authorities notify German consular officials of his arrest. The competent authorities did not inform either of the LaGrands of this right.

1.6. The Consular Convention establishes procedures for facilitating State-to-State consular relations. In this context, the Convention provides non-citizens with a right to consular notification in certain circumstances, but it does not require a State to provide any remedy in domestic courts to non-citizens whom it fails to notify of this right.

1.7. The United States therefore made appropriate satisfaction when it acknowledged this breach of Article 36, paragraph 1 *(b)*, of the Consular Convention, when it extended its deep regrets and sincere apologies, when it assured Germany that compliance must be improved and when it made extensive efforts to prevent future occurrences.

1.8. The central facts are not in dispute. On a day in January 1982, Walter and Karl LaGrand killed a 63-year-old bank teller and left a 20-year-old woman near death. After a sentencing hearing in December 1984, an Arizona trial court condemned the LaGrands to death, weighing the aggravating factors of the crime against mitigating factors that included a troubled childhood in Germany. A lengthy process then began that involved two court systems, state and federal, and three different procedures, an appeal from the original judgment and two different collateral reviews through *habeas corpus* procedures. These extensive efforts lasted 15 years. No international law principle requires this number and variety of judicial channels or for that matter that a federal court system even exist to review state court judgments.

1.9. Germany learned of the detention of the LaGrand brothers in 1992, supported clemency in February 1999, but raised the possibility of a consular failure only two days before the execution of Karl LaGrand.

1.10. Germany's position is difficult to summarize, not least because it takes contradictory positions on several of its central tenets. Indeed, a substantial gap exists between the general assertions of Germany and the specific requests it makes to this Court. Germany cannot have it both ways.

1.11. First, Germany says that it does not ask this Court to act as a court of criminal appeals. Yet we heard again and again how it asks the Court to scrutinize — and hold unlawful — various aspects of the criminal law and procedure of both the United States and the State of Arizona and to examine critically a number of actions of courts, prosecutors and defence counsel. Over the last week, the Court has been asked to review the sufficiency of the testimony of experts during trial, the competence of the LaGrands' counsel, and the adequacy of state and federal procedures for review of convictions and sentences.

1.12. Second, Germany says that it does not ask the Court to tell the United States how to comply with the Consular Convention. Yet it asks the Court to find certain aspects of the US criminal system contrary to the Convention, such as the federal and state rules of procedural default concerning the time and manner in which defences must be raised, and to require that new procedural rules be substituted. As we have made clear, the Consular Convention neither provides, nor requires a State to provide, remedies in domestic courts for failures of consular notification. Even if the Convention had required domestic remedies, a rule that requires timely raising of claims, such as the rule of procedural default, is common in judicial systems. Nor does the US rule stand in the way of justice. Untimely claims are still allowed if individuals can demonstrate prejudice to their case and a good reason for failing to raise the claim in a timely manner, such as because counsel was ineffective. If the United States is to have discretion on how it complies with the Consular Convention — as Germany professes is its desire — then the Court should not respond to Germany's demand that specific features of the US system are unlawful.

1.13. Third, Germany says that this case is not about the death penalty. Yet its arguments that the US violated its obligations in the *LaGrand* case are clearly and heavily based on the LaGrands' executions. Entire portions of Germany's arguments consisted of condemnations of the death penalty and the manner of its implementation. If, as Germany says, this case is not about the death penalty, then the Court should not grant remedies or make findings related specifically to the death penalty.

1.14. The United States has among the most extensive and multifaceted procedures in the world for ensuring fairness and due process for criminal defendants. This overlapping system provides several layers of procedural protections. Mr. President, in this system of checks and balances, in this system of in-depth defence against unfairness, a failure of consular notification does not equate with a fundamental failure of due process. In the case of the LaGrand brothers, no one can honestly say that it did.

1.15. Thus, this Court can comfortably decide this case by properly implementing international law, without following the German entreaties to broaden improperly the scope of the Court's jurisdiction in this matter and distort the meaning of international conventions. For a correct decision on international law will be fully consistent with the highest standards of fairness in criminal proceedings. This is the World Court.

1.16. Mr. President, Members of the Court, thank you very much for accommodating our request to begin this session at 2 p.m. rather than the usual hour. As a reciprocal gesture, we intend to be brief and expect to finish by the tea break. We are confident of our position and do not need to repeat it at length.

1.17. I would propose that we proceed as follows. With your permission, each advocate will speak in the same order as on Tuesday. I therefore ask, Mr. President, that you begin by calling upon Attorney General Napolitano. Thank you.

The PRESIDENT: Thank you very much, Mr. Thessin. I now give the floor to Attorney General Napolitano.

Ms NAPOLITANO:

1. Introduction

Mr. President and Members of the Court:

2.1. As the Attorney General of Arizona, please allow me to present a brief rebuttal to the remarks yesterday that presented what can only be characterized as a distorted view of the American criminal justice system, particularly as it was embodied in the case of the LaGrands. Put simply, the State of Arizona made an error in 1983, an error for which it has apologized and for which considerable corrective actions have been taken. Germany's attempt to transform that error into the precipitating cause for the LaGrands' convictions and sentences has no support in the actual record of this case. It is revisionist history unrelated to the facts and unrelated to the 15 years and three separate court processes that, I submit, ensured the LaGrands received all the protections guaranteed to capital defendants — whether or not they are foreign nationals. Germany is unhappy with the result because Germany seeks to abolish the death penalty. Had the LaGrands received a sentence of life imprisonment, I doubt whether we would be here today. I am confident this Court will apply international law appropriately, and not make the death penalty part of its calculus notwithstanding Germany's backhanded attempt to argue otherwise.

Let me briefly address four points.

2. Mitigation evidence

2.2. First, mitigation evidence. Yesterday, Germany attempted to argue that they have established a causal relationship between the failure to notify the LaGrands of their consular rights and actual prejudice to the conduct of the defence. Germany's contention is based on the hypothesis that, had they been notified, they would have produced mitigating evidence that would have prevented imposition of the death penalty. This hypothesis overlooks, yet again, the evidence that was presented on behalf of the LaGrands. And, contrary to Germany's assertions, what Germany is asking this Court to do would involve this Court in, to use Germany's own words, the "nitty gritty"[1] of a criminal case — a function this Court is neither designed nor equipped to perform.

2.3. Prior to the sentencing hearing, the presentence report was filed. In the report, the probation officer outlined the LaGrands' social history. The report described the LaGrands' heritage, the dysfunction of the LaGrands' household from an early age, and how the LaGrands were placed in and out of various foster-care facilities[2]. At the sentencing hearing, the LaGrands' attorneys called psychiatric experts to support the statements in the presentence report. Dr. Gurland testified that Walter came from a broken home and was placed in other foster homes[3]. The doctor recounted the interracial nature of Walter LaGrand, and how Masie LaGrand, Walter LaGrand's adoptive father, was the only stable male relationship in Walter's life[4]. The doctor reminded the court of the turmoil Walter LaGrand faced in being placed in different foster-home facilities[5]. The Court noted physical abuse, Walter's poor academic record at school, and the ostracism by his peers[6]. Walter LaGrand's attorney then called Patricia LaGrand, Walter's sister, to testify in support of the doctor's findings[7]. Karl LaGrand's attorney presented a similar case. His expert, Dr. Meshorer, testified that Karl had the same social history and childhood background as Walter LaGrand[8].

2.4. Did the State of Arizona contest these claims of mitigation? No. Arizona accepted the LaGrands' claims as true. At the sentencing hearing the prosecutor did not contest them in any way[9]. So Germany postulates a very novel concept in American jurisprudence — the LaGrands were somehow prejudiced by not further establishing a mitigating circumstance that the prosecutor did not even contest.

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[1] CR 2000/30 p. 40, para. 6.

[2] Ann. MG 2, pp. 283-285.

[3] Ann. MG 5, p. 317.

[4] Ann. MG 5, p. 318.

[5] Ann. MG 5, p. 319.

[6] Ann. MG 5, pp. 321-323.

[7] Ann. MG 5, pp. 334-350.

[8] Ann. MG 5, p. 354.

2.5. Germany's argument that this Court must look at what was presented, how it was considered, and attempt to decide whether such evidence would have made a difference in the sentence imposed, is precisely the type of claim routinely raised in a court of criminal appeals. To find that there is prejudice based on lack of mitigation evidence, this Court would have to disagree with the Arizona Supreme Court, the United States Federal District Court for the District of Arizona, and the United States Court of Appeals for the Ninth Circuit[10]. All of these courts considered the mitigation proffered at the sentencing hearing and concluded that the trial court did not err in considering the evidence as insufficient to outweigh the horrific aggravating circumstances of the LaGrands' crimes.

3. Access to counsel

2.6. Second. access to counsel. Germany's position also overlooks a critical doctrine in American criminal law. All defendants are provided with defence counsel who are presumed to know the law and who are charged with making decisions about which defences to raise. Nothing prevented the LaGrands' lawyers from exploring the LaGrands' nationality and from raising the consular notification issue. The provision of counsel is a key safeguard against governmental misconduct, and it is an integral part of our criminal justice system.

2.7. Thus, it is disingenuous for the German Government to claim that the LaGrands were incapable of raising their rights because they did not know of their rights. American law assumes that defendants do not know of their rights. It is for that very reason — the lack of knowledge of one's rights — that in the United States a defendant is afforded an attorney, and guaranteed that the attorney will render effective assistance.

2.8. Furthermore, there is nothing remotely improper about a judicial system that insists that defence counsel raise issues of alleged misconduct early, whether they are alleged international or domestic law violations. That way, alleged breaches of rights can be factually explored and duly considered. The position Germany promotes provides a disincentive to defence counsel to raise issues early, and undermines the orderly administration of justice. It would give foreign nationals rights greater than American citizens charged with identical crimes. The Vienna Convention does not suggest or support such a result.

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[9] Ann. MG 5, p. 417.

[10] Ann. MG 3, pp. 300-301 (Arizona Supreme Court), MG 9, p. 47[illegible] (District Court), MG 10 p. 484 (9th Circuit).

4. Germany's hypothetical assistance

2.9. Third, Germany's hypothetical assistance. Germany also argued that they would have provided considerable assistance to the LaGrands. As their sole support for this argument, Germany claimed that they have now spent DM 100,000 on the *Apelt* case. As the record before this Court demonstrates, Germany's assistance in the *Apelt* case was extremely dilatory. When the attorney for Michael Apelt contacted the German Consul in 1989, Germany did not offer to help, but merely requested to be kept informed. I direct the Court again to the affidavit of Mr. Villarreal who details the reality, not the fantasy, of how Germany really treated Michael Apelt's request for assistance. This affidavit is in Tab 6 of the United States Supplemental Submissions.

2.10. Similarly, with respect to the LaGrands, Germany did not address the fact that in 1993, when contacted by the investigator for Karl LaGrand, their response was not to offer help but to question how nationality was relevant to Karl's defence. I direct the Court to Tab 5 of the United States Supplemental Submissions. In their attempt to explain away Germany's ignorance as to the legal significance of the LaGrands' German nationality, Germany claims that the letter of 17 March 1993 was to an investigator and not to Karl LaGrand's attorney. This statement makes no sense. The investigator worked for the attorney: he is an agent of the attorney. Any information requested by the investigator is the same as if it were requested by the attorney. Accordingly, Germany's speculation that they would have leapt to the LaGrands' defence is contradicted by their action — or inaction — in the *Apelt* case and by the uncontradicted facts in the *LaGrand* matter.

5. Direction to the United States Attorney

2.11. Fourth, direction to the United States Attorney. Finally, I must respond to the suggestion Mr. Donovan made yesterday in the argument on provisional remedies, which

Mr. Matheson will address in greater detail. Among the things Mr. Donovan claims the United States Government should have done was to direct the United States Attorney, the chief federal prosecutor, to sue the Governor of Arizona in federal court for an emergency order preventing Walter LaGrand's execution. The Court may be interested in knowing that I was the United States Attorney for Arizona before I was elected Arizona's Attorney General. I know of absolutely no precedent for Mr. Donovan's suggested action, and certainly none ever in Arizona. Mr. Donovan's argument is simply not a viable alternative given the relationship between the federal government and the states. It certainly was not an option in the unique and urgent circumstances of the *LaGrand* case — an urgency created by Germany's own delay in raising the consular notification issue.

6. Conclusion

2.12. Mr. President, that concludes my remarks. It has been a great honour to appear before you and to explain the entire history of the *LaGrand* case as it actually occurred. I ask you now to call on Professor Meron.

Le PRESIDENT : Je vous remercie, Madame l'*Attorney General*. Je donne maintenant la parole au professeur Meron.

Mr. MERON: Mr. President, distinguished Court,

3.1. I thank you for this opportunity to respond to the arguments made yesterday by the distinguished counsel for Germany.

3.2. First, Mr. President, burden of proof. We appreciate the advocacy of my learned colleague Professor Simma and of Mr. Donovan. But the repeated rhetorical appeals, such as "Catch 22", will not be a substitute, I submit, for the authoritative jurisprudence of this Court. As the Court stated in the *Nicaragua* case: the " the Court cannot . . . apply a presumption that evidence which is unavailable would, if produced, have supported a particular point of view".

3.3. Second, diplomatic protection. The learned Co-Agent of Germany stated yesterday: "the issue enters the picture only through the intermediary of the Vienna Convention . . .". But the Vienna Convention deals with consular assistance — I draw your attention to Article 5 — it does not deal with diplomatic protection. Legally, a world of difference exists between the right of the consul to assist an incarcerated national of his country, and the wholly different question whether the State can espouse the claims of its nationals through diplomatic protection. The former is within the jurisdiction of the Court under the Optional Protocol, the latter is not. In his first argument, on Tuesday, Professor Simma made it quite clear that he spoke of diplomatic protection in the classical sense. Please remember his mention of *Mavrommatis*.

3.4. In explaining the relevance of diplomatic protection, the Memorial stated: "According to the rules of international law on diplomatic protection, Germany is also entitled to protect its nationals with respect to their right to be informed . . ."[11] Thus Germany based its right of diplomatic protection on customary law. I have to recall that this case comes before this Court not under Article 36, paragraph 2, of its Statute, but under Article 36, paragraph 1. Is it not obvious, Mr. President, that whatever rights Germany has under customary law, they do not fall within the jurisdiction of this Court under the Optional Protocol?

3.5. May I draw the attention of the Court to the fact that the distinguished Co-Agent of Germany did not mention, much less dispute, the authoritative distinction this Court made in *Nicaragua* between jurisdiction over treaty and jurisdiction over custom. Let me conclude, diplomatic protection is not within the competence of the Court in this case.

3.6. Third, exhaustion of local remedies. The distinguished Co-Agent of Germany appears to make two arguments. First, that there are no available remedies. Second, that the breach of the duty to inform excuses the duty to exhaust local remedies.

3.7. As regards the first argument, let me start by agreeing with Germany's positions in its Memorial and in its arguments this week before this Court that diplomatic protection and any individual rights are indeed subject to the exhaustion of local remedies.

3.8 Germany contests, however, that remedies were available. May I invite the Court to turn its attention to paragraph 4.25 in the Memorial. Germany states that United States law "does not provide an effective remedy for the violation of the requirement of notification . . . *after* the defendant has been convicted in a jury trial" *[emphasis added]*. This implies two propositions which I submit to this Court are self-evident. First, that Germany concedes that effective remedies did exist at the state level. Indeed, in paragraph 4.28 in the Memorial of Germany: Germany agrees that "the doctrine of procedural default consists in the requirement of exhaustion of remedies at the State level before a *habeas corpus* motion can be filed with federal courts". Second, Germany would want the United States to provide for additional remedies at the federal level. But Germany is on thin ice here. As I have explained in some detail in my argument on Tuesday, international law does not require any additional level of review whatsoever in the federal courts. If no additional level of review is required by international law, I would like to ask: how can it be that the existence of non-discriminatory review requirements would be impermissible? Germany, I submit, cannot rewrite American law or international law to provide for an obligation of such an additional review at the federal level.

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[11] Memorial, para. 4.87.

3.9. As regards the second argument that the breach of the duty to inform excuses the duty to exhaust, Germany appears to want to have something that we colloquially, Mr. President, call a "double dip". First, it invokes the breach of the duty of notification as the basic breach, a *sine qua non* of these proceedings. Second, it uses this same breach to excuse non-exhaustion of local remedies for the commission of that breach. Surely, this attempt is unconvincing. Imagine for a moment that Article 10 of the European Convention on Human Rights, which concerns the right to receive information, would be interpreted by the European Court of Human Rights as implying a right to be informed about a particular matter. Imagine further that the State has violated that right in a particular case. Would Germany seriously argue that the requirements of exhaustion under the European Convention would be suspended in this case even though the "victim" had a lawyer?

3.10. I have already explained at some length that the lawyers for the defendant had the duty to raise the matter of the breach in the courts of Arizona. May I ask the Court to note that Germany did not respond to, or dispute, our detailed arguments that the duty to raise the breach of notification was the duty of the lawyers, that international jurisprudence regards the defendant and his or her lawyer as one entity in terms of legal position, and that the case-law of the European Court of Human Rights — the only international tribunal that has considered this matter — makes it clear that a State is not accountable for either the errors or for mistaken strategy by lawyers. In short, the positions taken by lawyers — wisely or unwisely — do not excuse non-exhaustion of local remedies. Although the defendants may not be aware of the breach of the duty to inform, they had lawyers who are expected to know the law (for example, *Kaminski* v. *Austria*).

3.11. Fourth, practice. We argued that in its national practice Germany neither reviews nor annuls convictions where there has been a breach of the duty of consular notification — I am quoting from my argument here — "on the sole ground of such breach"[12]. Yesterday, the distinguished counsel for Germany told us that there is a possibility of review under German laws, but only, I repeat only, where rights may have been impaired. But where rights have in fact been impaired, concepts of prejudice operate also in the law of the United States.

3.12. But this is not the main point. The essential argument we made, and which was not answered by Germany, is that there has not been a single case, I repeat single case, in German national practice where Germany has annulled or quashed a conviction or a sentence rendered in absence of consular notification.

3.13. Germany, Mr. President, refers to the existence of general laws which could apparently cause a review of sentences in cases where rights have been impaired. But Germany has not demonstrated that its laws have actually been applied to review or to annul convictions or sentences rendered in breach of the duty of consular notification. The Court will recall that many such cases have occurred in Germany, many such cases have taken place with regard to American citizens sentenced to imprisonment in Germany in breach of the duty of consular notification. Germany suggests that the law that it cited yesterday is evidence of concordant practice by Germany. But reliance on some general laws in this context will not be more satisfactory than an invocation of the ten commandments as proof that we have stopped to sin. Of course, Mr. Kaul's attempts yesterday to introduce into the Convention concepts of punishment and the difference between capital and other punishment have no basis in the Convention. This would amount to amending the Convention.

3.14. By asking hypothetical questions about the practice of other States, Mr. Kaul has in fact conceded our argument that not a single State party follows Germany's asserted interpretation of the Consular Convention. I repeat our conclusion that the general practice of States, including that of Germany and of the United States, demonstrates that there has been a general rejection by States parties of the interpretation of the Consular Convention that Germany is asserting against the United States. In this case, which rests upon a certain interpretation of the Consular Convention, Germany has failed to establish that its interpretation has become international law binding on the United States.

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[12] CR 2000/28, p. 48, para. 3.46

3.15. Mr. President, distinguished Court. This is the 104th case on the General List of the Court. But in the annals of this Court, this case is quite unique. The Court is being asked to find the United States in breach of a proposition, based on an asserted interpretation of a treaty, which has neither a textual foundation in the text of the treaty, nor in the documented practice, nor in the *opinio juris* of States parties. This is quite different, I submit, from situations where a human right, for example, is recognized in the legal consciousness of States, though, alas, is often disrespected in practice. Far from even a rhetorical acceptance, State practice rejects the interpretation asserted by Germany. There is, therefore, and I come to my conclusion, in international law no norm here, there is no international norm which this Court, as a court of justice, can regard as binding on any State party; it cannot apply it against the United States.

Thank you, Mr. President. I would be grateful if you could now call on Ms Catherine Brown.

The PRESIDENT: Thank you, Professor Meron. I now give the floor to Ms Catherine Brown.

Ms BROWN: Thank you Mr. President and distinguished Members of the Court.

4.1. We reviewed the Vienna Convention at length on Tuesday and I will only do so briefly today. Nothing said yesterday refuted our basic point which is that Article 36 does not require that consular notification be incorporated into the criminal justice process of the member States or that breaches of Article 36 be remedied in that process. We ground that point in the first instance on the text of the Convention, what it says and what it does not say. Our point that States party have expressly provided for incorporation and remedies when they have wished to do so — such as in the Covenant on Civil and Political Rights — but that they did not do so in the Vienna Convention, was not addressed yesterday by our German friends.

4.2. Given the lack of an express requirement of incorporation, Germany has a particularly difficult burden; it must somehow make an intrinsic link between a breach of the last sentence of Article 36, paragraph 1 *(b)*, and the rights of the defendant in the criminal process. It failed again yesterday to do this. Instead it largely restated its erroneous assertion that the entire operation of Article 36 depends on informing the national (CR 2000/30, p. 19), and that the end result of a 17-year criminal process can be attributed directly to a failure to inform. Mr. Westdickenberg's suggestion yesterday that the United States has mixed up things that by their nature are separate (CR 2000/30, p. 9) could hardly better describe what Germany is doing, in mixing the separate spheres of consular notification and criminal prosecutions.

4.3. In the sphere of criminal prosecutions, a fair trial is, of course, essential, regardless of the defendant's nationality. It cannot depend for fairness on consular notification or on consular assistance. There is no right to or standard for consular assistance; a consular officer owes no fiduciary duty to his national, and does not have the obligations to him that a lawyer does.

4.4. By the same token, Article 36 is important within its sphere of consular relations and the performance of consular functions. It does not denigrate the importance of consular notification to keep it in proper perspective within its rightful sphere. We have always recognized that consular notification is important and that consular assistance, when requested and given, can in some instances assist in a criminal case. But this does not mean that it is so intrinsically linked to the criminal justice system that the system's results are inherently suspect if Article 36 requirement to inform is neglected. We do not parse Article 36 into what Mr. Simma called a "bag full of isolated rights with no apparent connection and no relevance whatsoever for criminal proceedings" (CR 2000/30, p. 18) when we simply suggest that what may sometimes be relevant is not essential, and is not required to be made intrinsic. We certainly are not devaluing Article 36 by pointing out that the rule of procedural default that governs collateral review by our federal courts of state court proceedings cannot possibly violate that Article; how could it, given that the collateral reviews provided to defendants by the United States are highly unusual in international practice and that relevant international standards require nothing more than a single appeal?

4.5. The mere fact that Article 36, paragraph 1 *(b)*, applies to all detentions, including those that happen to occur before trial, which was mentioned yesterday (CR 2000/30, p. 18), does not provide the essential link — the intrinsic link — to the criminal process that Germany seeks, for all the reasons we explained on Tuesday. A foreign national may or may not be detained before trial. The more plausible link between Article 36 and legal proceedings is the provision in Article 36, paragraph 1 *(c)*, allowing consular officers to arrange legal representation for their nationals. Germany suggested yesterday that our view of this provision would allow a receiving State to circumvent Article 36 by appointing a lawyer for the defendant (CR 2000/30, p. 19), but that was a gross mischaracterization of our point. Our point is that this one textual reference is too thin a thread to bind the sphere of criminal process and the sphere of consular communications together so tightly that a criminal prosecution, no matter how far along, must be reopened simply because a consular officer did not have a chance to arrange counsel for someone who in fact was represented by counsel.

4.6. Finally, we were gratified yesterday that Germany disavowed any interest in a remedy of automatic nullity. But it said nothing in response to our suggestion that requiring a remedy based on prejudice would raise serious questions relating to the inviolability of consular archives and the privileges and immunities of consular officers which are also provided for in the Vienna Convention on Consular Relations.

4.7. Turning to State practice, yesterday for the first time we finally heard Germany try to address our long-standing observations. We especially appreciated its candid confirmation that practice is generally just as we have described it. (CR 2000/30, p. 27.) As for the rest, with all due respect it was not only belated, but also inadequate. We look to State practice as a tool of interpretation. We had already acknowledged that some States have incorporated Article 36 into domestic law or provided domestic remedies for violations. But the important fact, which Germany in no way refuted, is that, regardless of their practice with respect to the death penalty, the great majority of States have not incorporated and have not provided criminal justice remedies for violations. This is consistent with the text and the fact that the text states no requirement of incorporation. In short, State practice confirms our reading of the Convention.

4.8. Finally, on the question of State practice, given Germany's emphasis yesterday on the advisory decision of the Inter-American Court in OC-16, it was particularly noteworthy that Germany said nothing about the practice of the States of Latin America. Our State practice survey did not find any special remedies for failures of notification in that area of the world, where failures of notification are common. Moreover, there is no evidence that any State of the Inter-American system has changed its practice as a result of OC-16. The practice in that region that we think is most relevant is that Mexico and the United States entered a prisoner transfer treaty fully aware that Americans who would be transferred to the United States would in many cases not have received timely consular assistance, and yet they would continue to serve their Mexican sentences in the United States. This is indeed how prisoner transfer treaties operate in all cases[13].

4.9. Shifting finally to the *travaux*, I do not believe that much of interest was said yesterday at all, leaving aside the confession that Germany is pushing for a "state-of-the-art interpretation" of Article 36 based in part on the inclusive nature of the *travaux* with respect to individual rights (CR 2000/30, p. 21). The Court will recall that on Tuesday I expressly noted that we accept the obvious — that Article 36 talks in terms of individual rights — but that of course is not the relevant question. The Court will also recall that I streamlined my discussion of the *travaux* in order to finish before lunch. If I had not done so, I would have noted that there were in fact a few mentions of human rights in the discussion that led to the final version of Article 36. But the mention of human rights by the Greek delegate Germany referred to yesterday (CR 2000/30, p. 22) cannot make consular notification a human right or an element in the criminal justice system[14]. The comments of the Greek delegate in any event were not made about the obligation to inform the detainee — which has never been conceived of as a human right. Rather, the statements were made in a different context before the last sentence of Article 36, paragraph 1 *(b)*, was considered[15].

4.10. In fairness, if we look at the *travaux* as a whole, we can find something for almost everyone. But we cannot find something for Germany. The *travaux* do not give Germany the link between consular notification and criminal proceedings needed to sustain its position. Nor do they reflect a consensus that Article 36 was addressing immutable individual rights, as opposed to individual rights derivative of the rights of States. Certainly the delegates' decision to allow the individual to decide whether his consular officers would be informed of his detention did not reflect a sense of rights belonging primarily to the individual, as Mr. Simma suggested yesterday (CR 2000/30, p. 21). If that were true, how could we explain the fact that Germany and other States felt entirely free after the Vienna Conference to negotiate consular conventions that provided notification without regard to the wishes of the individual? A particularly interesting example, although not in force, is the 1967 European Consular Convention, which in Article 6 addresses exactly the same issues that were addressed in Article 36 of the Vienna Convention, but it does so without once referring to a right of the individual[16].

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[13] See US Counter-Memorial, Exhibit 8, pp. 12-13.

[14] Official Records, Vol. I, p. 39, para. 33 (17 April 1963) (plenary); p. 339, para. 13 (15 March 1963) (Second Committee).

[15] *Id.*, pp. 81-87 (22 April 1963).

4.11. Germany also made some effort to address the question of waiver (CR 2000/30, p. 19), but its comments were not particularly responsive. Our point was that the reference to the possibility of waiver in the *travaux* supports our view that, whatever the nature of individual rights in Article 36, those rights still ultimately belong to the States party. Thus, the Vienna Convention would not bar a State unable to assist its nationals from asking a receiving State to stop implementing the last sentence of Article 36, paragraph 1 *(b)*. Germany's observations that its nationals have some kind of a right under German regulations to consular assistance does not refute this point which was about the Vienna Convention. Nor does it speak to German nationals' rights in the criminal justice systems of receiving States. Clearly a judge presiding over a criminal trial in a receiving State could not direct a German consular officer to appear and to provide assistance to a German national at the national's behest. But in the United States, at least, the judge could require a lawyer to undertake the defence. That is a significant difference bearing on the relationship between consular notification and the criminal process.

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4.12. Mr. President, on Tuesday I noted that the 165-odd States party to the Vienna Convention on Consular Relations are engaged in a continual conversation about consular notification and access, and I urged the Court to respect that conversation by rejecting Germany's invitation to revision. If I may return to that theme in closing, I would ask the Court to imagine that conversation if Germany's invitation were accepted. Let me just note a few countries that have only recently acceded to the Convention: Armenia in 1993, Azerbaijan in 1992; Bahrain in 1992;

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[16] E.g., European Consular Convention, Article 6, E.T.S. No. 61 (signed 11 Nov. 1967; not in force).

Barbados in 1992; Eritrea in 1997; Libya in 1998; Mauritania just this year; Qatar in 1998; and Thailand in 1999. At least some of these countries undoubtedly joined because they were encouraged by other States to do so. It certainly has been the practice of the United States to encourage accessions, in the interests of having a uniform framework for consular relations.

4.13. In such an encouraging conversation, it is well within the realm of imagination that a State thinking of acceding will ask a few questions about Article 36, perhaps expressing concern that it will be difficult to comply, given the country's size, its infrastructure and other factors. If that State were told that this Court had said that a State party must remedy breaches of Article 36 in its criminal justice system, it might be somewhat taken aback. After reflection, it might ask, "You mean, even if we give a foreign national a full and fair trial, with all the safeguards we give to our own nationals, our criminal courts will still have to decide retroactively what would have happened if the national had been told that he could have his consular officials informed? No matter how far the process has proceeded — even if the appeal is over? Even if the person speaks our language perfectly, and has lived in our country almost all his life? Even if he hardly even knew that he was a foreign national, didn't speak his own country's language, and had had no contact with his country for many years?"

4.14. I suggest that explaining that the decision of this Court technically applied only to the *LaGrand* case between Germany and the United States would not be a satisfactory answer to these questions. In the majority of cases, the difficulties of ensuring perfect compliance with Article 36 and the importance that States attach to the integrity of their criminal justice systems would simply preclude States from agreeing. I will go further, and suggest that many of the States now party to the Convention would not have adhered to it — at least not without reservations — had they so understood it. And I again ask that the Court bear in mind that its decision in this case will inevitably have far-reaching implications, and that the Court reject Germany's invitation to give the Vienna Consular Convention a state-of-the-art meaning that the 165-odd States party to it never contemplated.

4.15. Mr. President, that concludes my presentation, and I request that you now hear from Mr. Mathias.

Le PRESIDENT : Je vous remercie, Madame Brown, et je donne maintenant la parole à M. Mathias.

Mr. MATHIAS:

5.1. Mr. President, Members of the Court. Let us take one last look at the German submissions.

5.2. With respect to the first submission, we heard nothing more about the alleged breaches of Articles 5 or the other aspects of Article 36, paragraph 1. So we urge the Court to reject the first submission to the extent that it alleged that Germany was denied the possibility of rendering consular assistance. With respect to causation, Germany has not borne its burden of proof to show that the execution of the LaGrand brothers, as it appears as a subject of each of Germany's first two submissions and as a predicate for part of the fourth submission, was caused by a breach of the Vienna Convention. Attorney General Napolitano has addressed the facts relating to this contention. On Tuesday, we quoted the Third Report of the current Special Rapporteur of the International Law Commission for State Responsibility, which stated that the causal link between the breach of Article 36, paragraph 1, and the execution of the LaGrands was "indirect and contingent". Nothing said yesterday provided the missing links. Professor Meron has discussed the Court's lack of jurisdiction under the Optional Protocol to consider Germany's claim of diplomatic protection, and the first submission's reference to Germany's right of diplomatic protection of its nationals should be rejected as well.

5.3. Turning to the second submission, which has to do with the interpretation of Article 36, paragraph 2, counsel for Germany apparently did not understand the position of the United States. Counsel observed, yesterday, that "In the view of the United States, paragraph 2 would add nothing to paragraph 1". But, this is clearly not the case. The United States believes that paragraph 2 has a very clear meaning, which is suggested not only by the text itself but by the *travaux*. Paragraph 2 means, as it says, that the rights referred to in paragraph 1 shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso that said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under the Article are intended. So, for example, communications between the consular post and the detainees are subject to local law, but that law must enable full effect to be given to the purposes for which the right of communication is intended. Similarly, and here we are merely taking an example from the *travaux*, laws and regulations relating to prison visits would be subject to the proviso[17]. So might laws and regulations relating to, say, mail or telephone access by detainees. So, the United States attaches a clear and distinct meaning to paragraph 2. This meaning has the added virtue of finding support in the text and the *travaux*, which is not the case for the interpretation suggested by learned counsel for Germany.

5.4. Germany's second submission should be rejected because it is premised on a misinterpretation of Article 36, paragraph 2, which reads the context of the provision — the exercise of a right under paragraph 1 — out of existence. Counsel spoke a good deal about Article 36, paragraph 2, yesterday, but they did not provide a textual basis for their view that domestic law must allow for procedures to bring claims to remedy breaches of the rights in paragraph 1, as opposed to the allowing for the exercise of the rights in paragraph 1. Nor did they further develop their unsupported assertions that doctrines either of effectiveness[18] or of dynamic interpretation would support the rewriting of the text of the Convention.

5.5. Let us turn now to the fourth submission. First, I will address the jurisdictional issue that the United States has raised. The United States has argued that the Court lacks jurisdiction under the Optional Protocol to require an assurance or guarantee. Germany asserts that this position would

> "lead to absurd results. Clauses or optional protocols on dispute settlement appended to treaties could not fulfil their function because situations of breach could not be handled adequately, or not at all."

But we attempted to make it clear that our jurisdictional argument did not apply to jurisdiction to order cessation of a breach or to order reparation, but is limited to the question of assurances and guarantees. Now Professor Simma, who assured us that he was wide awake during those long meetings in Geneva, must acknowledge that the International Law Commission very clearly and deliberately considered that assurances and guarantees are conceptually distinct from reparation.

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[17] See Counter-Memorial, pp. 65-66 and No. 82.

[18] See, e.g., G. Fitzmaurice, *Law and Procedure of the International Court of Justice*, p. 357 (citing *Peace Treaties* case).

They are "future-oriented"; they relate to future conduct, they do not relate to the damage caused by the breach[19]. So Professor Simma's suggestion that, were this Court to decide that it lacked jurisdiction under the Optional Protocol to require assurances and guarantees, it could not fulfil its functions because it could not handle situations of breach "adequately or at all" is fundamentally flawed. We are confident that this Court could decide that it lacks jurisdiction over assurances and guarantees without in any way undermining its jurisdiction to order reparation or cessation. It does the Court no credit to suggest otherwise. Moreover, does Professor Simma suggest that the Court's handling of situations of breach throughout its history has been inadequate, because the Court has never found it necessary — or even concluded that it is able — to order assurances and guarantees?

5.6. My next point follows from this one. For all of counsel's insistence concerning the popularity of assurances and guarantees among the members of the International Law Commission, I believe that his discussion confirmed a number of significant points, which I will just mention quickly. First, he confirmed that there are no cases outside, perhaps, *lex specialis* in the human rights area, in which a court has ordered assurances or guarantees. Second, his silence confirmed the related point that the draft article on assurances and guarantees is an exercise in progressive development of law, and not codification of customary law. As we have seen, the first sentence of Germany's 1997 comments on the subject[20], expressing doubts about the customary law underpinnings of guarantees, is to the same effect.

5.7. Counsel observed that all secondary rules create obligations "over and above" the obligations created by primary rules. But questions arise in this context, whether assurances as provided in the quite limited diplomatic practice of States are intended to give rise to obligations of a legal nature, and whether customary international law supports the imposition of such an obligation where such imposition is not necessary in respect of the damage caused by the breach. Moreover, because the content of assurances in any given case will be derived from the content of the primary obligation, there is the possibility of a conflict where, as here, the remedy for a breach of the primary obligation may be informed by special considerations, such as the practice of States party to the Consular Convention, about which Ms Brown has spoken. No similar special régime would apply to an obligation undertaken in the assurances.

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[19] See, e.g., A/CN.4/507/Add.1 at para. 168.

[20] A/CN.4/488 at para. 104.

5.8. I do not think counsel explained how guarantees can be both reparation and not reparation at once, but the point is, dare I say it, academic, because in any case the entitlement to assurances in this case has not been proved.

5.9. With respect to the recent comments of the United States on "State Responsibility" before the Sixth Committee, counsel attempted to derive some significance from the fact that those comments did not discuss our concerns about draft article 30. This omission has no significance. As we noted in the speech in the Sixth Committee, our speech was to focus on the two major conceptual issues that remain in the draft articles — the treatment of countermeasures and of serious breaches. These are complex and difficult subjects, and we decided to deal with them in some depth and expressly to reserve our position on the other issues in the articles for the written stage. We thought that it would be most helpful to the Commission to proceed in this manner, because it would give the Commission at the earliest possible time the benefit of our views on the most difficult conceptual issues. Assurances and guarantees, while clearly an issue in which we have a compelling interest in the present case, do not present the same large conceptual issues.

5.10. Now let me discuss, briefly, the nature of the specific assurances sought by Germany in this case. Counsel suggest that no absolute obligation was intended by the fourth submission. This is, of course, a welcome development for us. While counsel stated that the incorrectness of our reading should have been clear from the work of the Commission on the subject, the point is not so clear to us based on our own review of the "Commentary" on the article as adopted on first reading[21] and on the text of the current draft article. In any case, the submission appears to us to be stated in absolute terms, and it was not modified by Germany.

5.11. Precisely what Germany is seeking in its fourth submission, if not an absolute guarantee, was, however, not sufficiently clarified. Counsel mentioned certain preventive measures. Would the distribution of 400,000 of these wallet cards for law enforcement officers — they say "Instructions for arrests and detentions of foreign nationals", and 400,000 have been distributed — would that constitute such a preventive measure? Would the establishment of a new senior position in the Department of State — with the direct responsibility for ensuring that information concerning the right to consular notification is provided without delay — would that be such a preventive measure? The United States has undertaken a wide-ranging, long-term programme to improve its compliance with the duty to inform. In this context, Germany's criticisms are unrepresentative and unsubstantiated.

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[21] A/CN.4/SER.A/1993/Add.1. (Part 2) at p. 82.

5.12. In the view of the United States, the assurances that have already been provided to Germany obviate the need for the Court to decide whether additional appropriate assurances should be available to Germany in respect of the US breach of its duty to inform the LaGrands of their right to consular notification under Article 36, paragraph 1. Therefore, with respect to the fourth submission, we submit that it should be rejected in its entirety, in light of at least the following factors: the uncertain status of assurances under international law; the lack of clarity of the scope of the assurances sought by Germany in the submission; the absence of an underlying breach except with respect to the duty to inform; the unproven nature of the late-filed alleged instances of additional breaches of the duty to inform; the imprecision of the submission's text with respect to assurances in respect of the claimed breach of Article 36, paragraph 2; the unjustified interference in the domestic law of the United States that the submission would entail; and the absence of any basis in the Vienna Convention for an assurance relating specifically to capital punishment.

5.13. Mr. President, Members of the Court, counsel for Germany have constructed a mirage of argument and authority in support of their claim. But as the American songwriter Bob Dylan has written, "What looks large from a distance/Close up is never that big". The Court should find that the same is true with respect to the German submissions, and, dare I suggest, the German case in its entirety.

5.14. I thank the Members of the Court for their courtesy and attention. Mr. President, would you please call upon Professor Trechsel?

The PRESIDENT: Thank you, Mr. Mathias. Je donne maintenant la parole au professeur Trechsel.

M. TRECHSEL :

6.1. Merci, Monsieur le président, Madame et Messieurs les juges, en écoutant nos estimés adversaires hier matin, j'ai eu l'impression que des malentendus s'étaient produits — M. Simma a dit la même chose. Je m'efforcerai de réparer comme l'ont fait mes pré-opinants quelque peu cette impression d'un «dialogue de sourds» qui aurait pu se former.

6.2. A écouter certains discours on aurait pu croire que nous aurions rejeté entièrement les garanties de l'article 36 de la convention de Vienne. Comment expliquer autrement le fait que l'on nous a encore cité ce document de la Commission des droits de l'homme des Nations Unies n° 2000/65 sur la peine de mort ? Pour ma part, je salue vivement cette initiative. Et nous ne nous sommes pas opposés à ce que l'article 36 soit en effet appliqué.

6.3. Sur le plan personnel je tiens à répéter que je supporte toute initiative qui pourrait diminuer le nombre des exécutions et je ne serai pas satisfait tant que le chiffre sera supérieur à zéro.

6.4. Cependant, je me considère comme un juriste spécialisé quelque peu en matière des droits de l'homme et non pas comme un activiste des droits de l'homme. Nous devons, même si ce n'est pas toujours facile, nous laisser guider par la raison juridique. Par exemple, la Commission européenne des droits de l'homme a déclaré irrecevable la requête de M. Kirkwood qui allait être extradé aux Etats-Unis où il risquait la peine de mort[22]; c'était une décision très difficile, mais le droit l'exigeait. Hier, le coagent du Gouvernement allemand a cru devoir faire certains commentaires sur ma personne, commentaires que j'ai regrettés. Je tiens simplement à affirmer que je n'accepte pas les étiquettes de «fondamentaliste» où d'adhérant à une *Begriffsjurisprudenz* et je ne suis pas mû par les motivations qu'il me prête. Par ailleurs, ceci n'est pas une affaire dans laquelle votre Haute Cour est appelée à se prononcer pour ou contre les droits de l'homme. La tâche de la Cour se limite à dire quelles sont les obligations que les Etats ont assumées en ratifiant la convention de Vienne et, notamment, si cette dernière leur impose de prévoir des recours spécifiques en cas de violation.

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[22] Requête n° 10479/83, *Kirkwood c. Royaume-Uni*, décision du 12 février 1984, D.R. 37, p. 158 et suiv.

6.5. Le *chiàro scuro* que nous avons tant aimé sur les toiles de Rembrandt au Mauritshuis nous le rejetons lorsqu'il est opéré pour distinguer simplement deux espèces de droit, les droits de l'homme ou les droits de l'Etat. Il nous paraît juste et important de différencier. Je distingue, par exemple, des droits de l'homme, le droit humanitaire, mais aussi le droit des minorités, sans vouloir, évidemment, diminuer l'importance des uns ou des autres[23]. Je ne vois aucune utilité à mélanger tout dans un même pot pour bouillir un *minestrone ai dritti dell'uomo* de droits individuels internationaux. Nous entendons renforcer les droits de l'homme en leur reconnaissant leur caractère spécifique. Ce n'est pas par hasard que l'article 2, paragraphe 3 *a)*, du Pacte international sur les droits civils et politiques (ainsi que les instruments régionaux analogues) donne à toute personne alléguant que ses droits ont été violés le droit à un recours effectif. Le Gouvernement allemand ne semble attacher aucune importance à cette clause puisqu'il prétend que la même règle doit s'appliquer à la convention de Vienne qui ne connaît pas une disposition analogue.

6.6. Pour les raisons avancées mardi, surtout celles associées au principe de la réciprocité, nous maintenons notre point de vue que si la convention de Vienne accorde bien des droits individuels, il ne s'agit pas là de droits de l'homme.

6.7. Le professeur Simma a dit hier son étonnement de m'avoir entendu citer beaucoup de jurisprudence de «Strasbourg». Pour ma part, son étonnement m'étonne. Il y a aujourd'hui dans le monde deux cours internationales des droits de l'homme. L'une a produit 2 jugements sur le fond et 16 opinions consultatives, l'autre quelque 1200 jugements, sans parler des quelque 35 000 décisions de la Commission européenne des droits de l'homme. Nous devons tout de même nous en tenir à la jurisprudence qui existe. Nous comprenons très bien que l'Allemagne s'appuie sur le solitaire pilier de l'opinion OC/16 pour supporter sa thèse, mais le pilier ne tient pas, pour la simple raison qu'il n'est motivé de façon insuffisante. L'intention est tout à fait louable, mais même ici le but ne peut pas sanctifier n'importe quel moyen.

6.8. Nous avons démontré, en vous citant, entre autres, un certain nombre de décisions judiciaires trouvées dans des pays divers, que la convention de Vienne n'a pas été considérée, jusqu'ici, comme une règle de procédure pénale, règle dont la violation pourrait donner lieu à cassation. Nous constatons que l'Allemagne n'a pas été en mesure de nous opposer un seul jugement qui irait dans le sens contraire.

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[23] Voir à ce sujet ma contribution à l'ouvrage dédié à la mémoire de Rolv Ryssdal.

6.9. Finalement, permettez-moi, Monsieur le président, Madame et Messieurs de la Cour, un commentaire et une mise au point sur ce qui vous a été dit au sujet des moyens de recours en droit de procédure pénale allemande. On vous a encore cité le paragraphe 337 du code de procédure pénal et la réglementation du recours en cassation appelé *Revision*, dont j'avais déjà parlé mardi. Or, Monsieur le président, Madame et Messieurs de la Cour, il s'agit là d'un recours ordinaire dans le sens qu'il doit être présenté dans un certain délai; il empêche notamment le jugement d'acquérir la force de la chose jugée. Or, dans l'affaire LaGrand, ce n'est pas au cours de l'épuisement des voies de recours interne que la règle du *procedural default* a été appliquée. Cette règle s'est appliquée lorsque le jugement était déjà définitif, depuis un certain temps, dans des procédures de *habeas corpus*. Le droit allemand ne connaît aucune procédure de ce genre. Et il n'y aurait donc eu dans une situation parallèle en droit allemand aucun recours et non seulement pas de recours qui était conditionné par une règle du *procedural default*. Il me semble que la Cour devait être informée de ce fait et que ceci eusse été plutôt le devoir de l'Allemagne.

6.10. J'ai terminé, Monsieur le président, Madame et Messieurs de la Cour, mes quelques observations, et je vous prie, Monsieur le président, de bien vouloir donner la parole maintenant au professeur Matheson.

Le PRESIDENT : Je vous remercie, Monsieur le professeur Trechsel, et je donne maintenant la parole au professeur Matheson.

Mr. MATHESON:

7.1. Mr. President and distinguished Members of the Court, I will respond briefly to Germany's argument on the question of the effect of the Court's Order indicating provisional measures. The Court will recall that on Tuesday, we made four basic points, each of which would independently lead to the conclusion that the Court should decline to grant the relief requested by Germany on this issue, without the need to resolve the general question of the Court's authority to indicate provisional measures of a binding legal character.

7.2. *First*, we argued on Tuesday that in this case the measures indicated by the Court were — by their own terms — not binding in character. In its argument on Thursday, Germany did not attempt to argue that the language in the Court's Order was binding in character. This is not surprising, since the language used in the authoritative English text of the Order was clearly non-binding.

7.3. Counsel for Germany, apart from characterizing our argument as "the title of a bad novel" — that is a good line — limited himself to suggesting that provisional measures must always be binding, whatever their language, because judicial tribunals cannot issue orders that have non-binding character. This is entirely unpersuasive. As we pointed out in detail on Tuesday, international tribunals have in fact issued provisional measures that used non-binding language and were not intended to be binding. Examples of this include the orders of the International Tribunal of the Law of the Sea on 11 March 1998 in the *Saiga No. 2* case[24] and of 27 August 1999 in the *Southern Bluefin Tuna* case[25], as well as provisional measures issued by the European Court of Human Rights in the case of *Cruz Varas* v. *Sweden*[26]. In the latter case, the European Court stated that: "the very language of the request made in the present case confirmed its non-binding character" and that and I quote: "the question whether interim measures indicated by international tribunals are binding is a controversial one and no uniform legal rule exists"[27].

7.4. There is no reason why the Court must give provisional measures in mandatory form. As we argued, a tribunal may well choose to express its expectations in a non-binding form, particularly where — as in the present case — the measures in question deal with matters uniquely within the core sovereign functions of States, or are given *ex parte* at the very outset of a proceeding when the facts are complex and there is very limited time to assess the situation. In contrast, as we pointed out in detail on Tuesday, when a tribunal recognizes that a measure handed down by it has obligatory character, it uses mandatory language[28].

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[24] http://www.un.org/Depts/los/ITLOS/Saiga2-Order.htm. The Order contains one operative paragraph ordering one of the parties to refrain from certain action, and another operative paragraph recommending both parties to take a certain course of action. The fact that one of the measures was recommendatory was specifically noted.

[25] http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm. See CR 2000/29, para. 7.10. (14 Nov. 2000).

[26] Eur.Cit.H.R. Series A, No. 201 (20 Feb. 1991).

[27] *Id.*, paras. 92, 101.

7.5. Accordingly, we see no basis for concluding that the Court's Order in this case created binding obligations. This alone would dispose of Germany's request for a declaration that the United States violated legal obligations with respect to that Order.

7.6. *Second*, we argued on Tuesday that, whatever the legal character of the Court's Order, the United States in fact complied, in that it took every step reasonably available to it, given the extreme circumstances in which it had to act. On Thursday, Germany cited a list of actions that it believed could and should have been taken in the period of less than three hours between the receipt of the Court's Order and the scheduled execution. It was argued that the President might have issued an Executive Order directing Arizona not to proceed with the execution, or might have filed suit against Arizona in federal court for the same purpose.

7.7. I trust the Court will understand that actions of such constitutional importance and complexity could not possibly have been seriously considered in a period of less than three hours, let alone carried out. Germany's argument seemed to suggest that federal intervention in state criminal proceedings is fairly routine — for example, ordering a US Attorney to file an emergency action against a state governor in federal court. In fact, nothing could be further from the truth, and we know of no precedent for such an action. Certainly such an action would require a decision at the highest levels of the US Government after considerable deliberation.

7.8. Germany also argued that the US Supreme Court could and should have issued an immediate stay of execution upon receipt of the Court's Order. Germany pretends that it would have been a simple matter for the Supreme Court, which was at that moment engaged in resolving three separate suits on a variety of issues in the *LaGrand* case, to decide with virtually no time for reflection to take the extraordinary step of staying a state execution on the basis of provisional measures which on their face were not binding in character. Germany also seems to believe that the Court should have summarily ignored its own precedent with respect to its jurisdiction under the US Constitution and should have immediately given relief that was precluded by US law. We believe it would be unreasonable to expect the Supreme Court to have acted in this way under these extreme circumstances.

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[28] See CR 2000/29, para. 7.6. (14 Nov. 2000). On Tuesday, we cited a number of examples of this, including certain provisional measures adopted by this Court in the case concerning *Armed Activities on the Territory of the Congo*. Germany argued that our citation of this case contradicted our position that provisional measures of the Court generally do not have binding effect, but this is not correct. As we pointed out on Tuesday, the Court stated that both Parties "must" take all measures to comply with various existing obligations of the Parties under international law; this mandatory language reflected the fact that the Parties were already bound to carry out these international obligations. In any event, whatever the authority for using mandatory language in the *Congo* case, it clearly shows that the Court uses mandatory language when it recognizes the obligatory character of the measure, in contrast to the non-obligatory language of the Order in the present case.

7.9. Given the Supreme Court's dismissal of the suits before it, and the fact that the US Government did not consider the Court's Order to be legally binding, it is also unreasonable to hold that the Governor of Arizona acted in violation of international legal obligations in declining to stay the execution in these same final, hectic hours[29].

7.10. *Third*, we argued on Tuesday that the unjustified delay of Germany in bringing its request for provisional measures until the last possible moment makes it inappropriate to grant Germany's request for relief with respect to that Order. On Thursday, Germany made no reply to this point. It made no further attempt to justify the extraordinary timing of its request and its inexplicable delay in raising the issue of consular notification with the United States or in filing its case with this Court. It made no attempt to answer our contention that these actions seriously prejudiced both the United States and the Court itself, and were inconsistent with the Court's standards on procedural fairness, the equality of the parties, and the sound administration of justice.

7.11. This alone should preclude the relief sought by Germany on this point. To do otherwise would give unwarranted blessing to last-minute filings of such requests where there is no reasonable basis for a party's delay. As a precedent for such actions in the future by other applicants, it could have a significant and regrettable effect on the Court's operations and the rights of parties before it. One wonders, for example, what would happen should this occur when the full Court is not in session at the particular time.

7.12. Finally, we argued on Tuesday that the Court can fully and adequately dispose of the merits of this case without any need to resolve this issue about the effect of the provisional measures Order. We pointed out that the Court has not found it necessary or appropriate to give such relief in previous cases where one of the parties had not carried out provisional measures orders, and there is no substantive need or utility in doing so in this case. If the Court grants any of Germany's other requests for relief it will have given ample redress for the execution of Walter LaGrand, and if it decides against Germany's other requests, it would be highly anomalous to make the asserted violation of a provisional measures order the sole result of its decision on the merits.

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[29] In fact, for reasons indicated by Attorney General Napolitano on Tuesday, the Governor of Arizona had already denied the reprieve recommendation made by the Board of Executive Clemency on 2 March, and a new recommendation would have been required to enable the Governor to grant a reprieve in response to the Court's Order of 3 March. This would have required reassembly of the Board, and the participation of the victims. Given the time constraints, the distance involved (Arizona is a very large state), it is far from clear that this could have been done in the short time available.

7.13. Germany addressed this point in its argument on Thursday, but with respect, its comments seemed to be beside the point. Its argument seemed to be that the offence to Germany from the failure of consular notification was aggravated by the execution of its national. Of course, as the Court is aware, we have agreed that the failure of consular notification was a violation of the Vienna Convention, but we disagree that the execution was a violation of the Convention or an "aggravation" of the previous breach. But, in any event, we do not see how this assertion about the merits of the case makes it necessary or appropriate for the Court to give additional relief directed at the effect of its provisional measures Order.

7.14. In short, we contend that the circumstances of this case offer a very unsuitable vehicle for the Court to attempt to resolve the long-standing and important question about the scope of its authority to issue binding provisional measures. These circumstances include: Germany's delay in bringing its request until the last possible moment — which it did not attempt to justify on Thursday; the non-binding character of the language of the Order — which Germany again did not refute on Thursday; the impossibly short period in which the United States was given to act; and the lack of any operative need to resolve this matter in the present case. We submit that, under these circumstances, there is no basis for a determination that the United States violated legal obligations with respect to the provisional measures Order.

7.15. Now, just to be clear on the matter, we reiterate that if the Court nevertheless believes that it must now decide the general question of whether its measures are binding under the Statute, the United States reaffirms the detailed arguments on this point that are contained in our Counter-Memorial. There has been no "strategic retreat" on our part on this matter, as was suggested by Germany. However, we believe that the Court can and should dismiss the relief requested by Germany, without having to resolve this general issue.

7.16. Mr. President, this concludes my comments, I thank the Court very much for its attention. And I now suggest that the Court call on the US Agent, Mr. Thessin, to complete the rebuttal of the United States. Thank you, Sir.

The PRESIDENT: Thank you, Mr. Matheson. I now give the floor to Mr. Thessin.

Mr. THESSIN:

Mr. President, Members of the Court.

In his final remarks yesterday, Mr. Westdickenberg recalled the crimes of Karl and Walter LaGrand and the suffering of the victims and those left behind. The brutal murder committed by the LaGrands is indeed the backdrop against which this case arose.

But the case itself is neither about that brutal murder nor about the sentence imposed by the authorities of the State of Arizona. It is limited to the dispute between Germany and the United States arising out of the Vienna Convention on Consular Relations. And the Vienna Convention on Consular Relations does not provide an international legal basis on which Germany may complain about the criminal justice system in the United States as it operated in the case of the LaGrands.

The United States has accepted responsibility, however, with respect to the single breach that is before the Court, the breach of the duty owed to Germany under Article 36, paragraph 1 *(b)*, of the Consular Convention to inform Karl and Walter LaGrand of their right to consular notification. Accordingly, the final submission of the United States is as follows:

The United States of America respectfully requests the Court to adjudge and declare that:

(1) There was a breach of the United States obligation to Germany under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations, in that the competent authorities of the United States did not promptly give to Karl and Walter LaGrand the notification required by that Article, and that the United States has apologized to Germany for this breach, and is taking substantial measures aimed at preventing any recurrence; and

(2) All other claims and submissions of the Federal Republic of Germany are dismissed.

Thank you, Mr. President and Members of the Court, for your courtesies and attentiveness. This ends the presentation of the United States side.

The PRESIDENT: Thank you very much Mr. Thessin. La Cour prend acte des conclusions finales dont vous avez ainsi donné lecture au nom des Etats-Unis d'Amérique, comme elle l'a fait hier pour les conclusions finales présentées par M. Westdickenberg, agent de l'Allemagne. Je vais maintenant donner la parole au juge Koroma qui souhaiterait poser une question.

Judge KOROMA: Thank you Mr. President. In the course of these hearings and in her submissions, Germany contends that the United States by applying the rules of domestic law, in particular the doctrine of procedural default, violated her obligations to give full effect to the purposes for which the rights accorded under Article 36 of the Consular Convention are intended. My question is this: Is it Germany's position that the application of the doctrine of procedural default in itself constitutes a violation of the Convention? Thank you, Mr. President.

Le PRESIDENT : Je vous remercie. Le texte de cette question sera bien entendu, comme d'ordinaire, communiqué par écrit aux Parties. Je rappellerai maintenant que les Etats-Unis, s'ils le désirent, pourront après la clôture de cette procédure orale, présenter des observations au sujet des documents nouveaux produits par l'Allemagne le 26 octobre 2000, et soumettre des documents à l'appui de ces observations.

La Cour a fixé au 8 décembre la date limite pour la présentation de ces observations et de ces documents. Les réponses par écrit aux questions posées par les juges Higgins et Koroma devront également être fournies à cette même date du 8 décembre.

Ceci nous amène à la fin de cette série d'audiences consacrées aux plaidoiries en l'affaire. Je tiens à adresser mes vifs remerciements et ceux de la Cour aux agents, conseils et avocats des deux Parties pour leurs interventions.

Conformément à la pratique, je prierai les agents de rester à la disposition de la Cour pour tout renseignement complémentaire dont celle-ci pourrait avoir besoin. Sous cette réserve, je déclare maintenant close la procédure orale en l'affaire *LaGrand (Allemagne c. Etats-Unis d'Amérique).*

La Cour va maintenant se retirer pour délibérer. Les agents des Parties seront avisés en temps utile de la date à laquelle la Cour rendra son arrêt.

La Cour n'étant saisie d'aucune autre question aujourd'hui, l'audience est levée.

L'audience est levée à 15 h 35.

SÉANCE PUBLIQUE DU 27 JUIN 2001, À 10 HEURES

LECTURE DE L'ARRÊT

Le PRESIDENT : Veuillez-vous asseoir. L'audience est ouverte. La Cour est aujourd'hui réunie, conformément à l'article 58 du Statut, pour rendre en séance publique son arrêt en l'affaire *LaGrand (Allemagne c. Etats-Unis d'Amérique).*

Je rappellerai que l'instance a été introduite par le dépôt au Greffe, le 2 mars 1999, d'une requête de l'Allemagne.

M. Herczegh, qui a assisté aux audiences publiques en l'affaire et participé au délibéré et au scrutin final, a malheureusement été empêché, pour des motifs qui ont été exposés à la Cour, d'être aujourd'hui présent sur le siège.

Conformément à l'usage, je ne donnerai pas lecture des paragraphes qui retracent les principales étapes de la procédure et reproduisent les conclusions des Parties. Je résumerai en outre les paragraphes 13 à 34 qui font état des faits qui sont à l'origine de l'affaire sans les lire intégralement. Dans ces paragraphes, la Cour rappelle que Walter LaGrand et Karl LaGrand étaient nés en Allemagne respectivement en 1962 et 1963 et étaient ressortissants allemands. En 1967, alors qu'ils éteient encore très jeunes, ils sont partis avec leur mère aux Etats-Unis pour y résider à titre permanent. Ils ont toujours conservé leur nationalité allemande et n'ont jamais acquis la nationalité américaine.

[Le Président donne lecture des paragraphes 14 à 128 de l'arrêt[1].]

Je prierai à présent le greffier de bien vouloir lire le texte du dispositif en anglais.

[Le greffier lit le dispositif en anglais[2].]

Le PRESIDENT : Le président joint une déclaration à l'arrêt; M. Shi, vice-président, joint à l'arrêt l'exposé de son opinion individuelle; M. Oda, juge, joint à l'arrêt l'exposé de son opinion dissidente; MM. Koroma et Parra-Aranguren, juges, joignent à l'arrêt les exposés de leur opinion individuelle; M. Buergenthal, juge, joint à l'arrêt l'exposé de son opinion dissidente.

Comme à l'accoutumée, le texte de l'arrêt est disponible sous forme multicopiée. Il a été également placé sur le site Internet de la Cour. Le texte imprimé sera disponible dès que possible.

La Cour n'ayant pas d'autre point à son ordre du jour, je déclare l'audience levée.

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[1] *C.I.J. Recueil 2001*, p. 475-514.

[2] *Ibid.*, p. 514-516.

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